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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARGUERITE L. JACKSON, ET AL.
Petitioners,

v.

GEORGE E. RUSSELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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QUESTIONS PRESENTED

1. Whether the Opinion of the Court of Appeals of Indiana permitting George E. Russell ("Russell") to execute on the community property of Marguerite L. Jackson contravenes Indiana's obligation under the full faith and credit clause of the United States Constitution, art. IV, § 1, to give full faith and credit to the substantive law of the State of Arizona.

2. Whether the Opinion of the Court of Appeals of Indiana was in violation of Marguerite L. Jackson's right to due process when it permitted Russell to execute upon Marguerite L. Jackson's partnership interest in Jackson Plastics Company and upon Marguerite L. Jackson's interest in Como Plastics Corporation stock, in which she has an indivisible community property interest, in order to satisfy a judgment only against her spouse, C. W. Jackson.

LIST OF PARTIES AND *RULE 28.1 LIST*

In addition to Petitioner Marguerite L. Jackson and Respondent George E. Russell, who are listed in the caption, the other parties to the proceedings below are all petitioners herein and are C. W. Jackson, Jackson Plastics Company, an Indiana general partnership, Excelarium Products Corporation, an Arizona corporation, Columbus Air Corporation, an Indiana corporation, and Tiger Development Company, an Arizona general partnership. *See* Rule 21.1(b).

Petitioners Excelarium Products Corporation and Columbus Air Corporation have no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1. These two corporations are not publicly owned.

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Petitioners,

v.

GEORGE E. RUSSELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and Opinion of the Court of Appeals of Indiana entered in the above-entitled proceeding on January 17, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals of Indiana in *Jackson v. Russell*, No. 06A01-8606-CV-151, was filed on January 17, 1989, is reported at 533 N.E.2d 153 (Ind. App. 1989), and is reproduced in Appendix ("App.") A ("Opinion"). The Order denying Petitioners' Petition for Rehearing by the Court of Appeals of Indiana is dated March 7, 1989 and is reproduced in App. B. The Order denying Petitioners' Petition for Transfer by the Supreme Court of Indiana is dated September 26, 1989 and is reproduced in App. C. The Findings of Fact, Conclusions of Law and Order dated October 14, 1987 and the Charging Order dated October 26, 1987 of the Boone Circuit Court, Boone County, Indiana ("Trial

Court") from which the appeal to the Court of Appeals of Indiana was taken are reproduced in App. D and E respectively.

JURISDICTION

The Opinion was filed on January 17, 1989. A timely Petition for Rehearing was denied on March 7, 1989. A timely Petition for Transfer to the Supreme Court of Indiana was denied on September 26, 1989, and this Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, § 1: Full faith and credit among states.

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment XIV, § 1: Citizen rights not to be abridged by states.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 24, 1984, the Trial Court entered a judgment in favor of Russell against the defendant C. W. Jackson ("Jackson") in the sum of Two Million Dollars ($2,000,000.00) plus costs ("Judgment"). Marguerite L. Jackson ("Marguerite"), Jackson's wife, was not made a defendant in that litigation, and no judgment has ever been rendered against her. At the time the Judgment was entered, Jackson and Marguerite had been married for more than 40 years, during which time they had lived together as husband and wife. The Jacksons have resided and have been domiciled in Arizona continuously since 1969.

A writ of execution ("Writ of Execution") was issued by the Trial Court Clerk to the Sheriff of Bartholomew County, Indiana on January 30, 1986. On March 12, 1986, the Trial Court entered a proceeding supplemental order ("March 12 Order"), ordering that Russell was entitled to the proceeds and profits from the sale of real estate located in Columbus, Indiana, which real estate is commonly known as Como Plastics ("Como Real Estate"). On March 31, 1986, Jackson filed his Motion to Correct Error in Writ of Execution and Proceedings Supplemental Order ("Motion to Correct Error") in the Trial Court, claiming, *inter alia*, that it was a violation of federal due process to order any proceeds and profits to which Marguerite might be entitled to be paid for the satisfaction of the Judgment solely against C. W. Jackson. *See* Motion to Correct Error, § II, p. 3. The Motion to Correct Error was denied by the Trial Court on May 15, 1986.

Jackson perfected his Interlocutory Appeal of those two proceedings supplemental orders and on July 18, 1986, Jackson filed his Brief for Appellant for Interlocutory Appeal in Case No. 06A01-8606-CV-151 ("Appeal 151")

("Interlocutory Appeal Brief"). The Interlocutory Appeal Brief raised the same federal due process issue addressed in the March 31, 1986 Motion to Correct Error. *See* Interlocutory Appeal Brief, Statement of Issues, p. 1.

On June 27, 1986 and December 29, 1986, respectively, Russell filed a Petition for Finding of Fraudulent Conveyances and amendment thereto ("Petition") challenging the transfers of certain personal property interests (in Jackson Plastics Company partnership, Como Plastics Corporation, Lincoln Meadows Corporation, and Excelarium Products Corporation) acquired by the Jacksons long after they had moved to Arizona. On July 24, 1986, Russell filed with the Court of Appeals of Indiana ("Court of Appeals") a Petition for Writ in Aid of Appellate Jurisdiction and for Stay of Appellate Proceedings, in which he asked the Court of Appeals in Appeal 151 to stay Jackson's Interlocutory Appeal of the Writ of Execution and of the March 12 Order pending a Trial Court decision on the Petition. On October 16, 1986, the Court of Appeals ordered the stay of Appeal 151 and remanded the case to the Trial Court for proceedings on the Petition. Russell then added several garnishee-defendants (now petitioners herein) as parties on November 19, 1986 and November 20, 1986.

A trial on the Petition was held in June, 1987. On October 14, 1987, the Trial Court issued its Findings of Fact, Conclusions of Law and Order ("Findings"). *See* App. D. Subsequently, on October 26, 1987, the Trial Court issued a charging order regarding the Jackson Plastics partnership ("Charging Order"). *See* App. E. In the Findings, the Trial Court correctly held that if the various properties at issue are "community property," then there is no basis for permitting Russell to challenge transfers of such properties. *See* Findings, App. D. However, by issuing certain other of the Findings and the Charging Order, the Trial Court improperly refused to recognize that Marguerite had an indivisible community property interest in the Jackson Plastics Company partnership even though it was argued that ignoring this property right violated due process and

full faith and credit. *See* Defendant's Post Trial Memorandum, p. 14.

Thus, after the Court of Appeals resumed consideration of Appeal 151, Petitioners herein, on November 4, 1987, pursuant to Appellate Rule 2(A), Indiana Rules of Appellate Procedure, filed with the Trial Court a praecipe designating a record of proceedings for the purpose of appealing the Final Orders in Proceedings Supplemental of October 14, 1987 and October 26, 1987, *i.e.*, to appeal the Findings and the Charging Order to the extent the Trial Court ignored Arizona community property law. Furthermore, on November 6, 1987, Petitioners filed a Pre-Appeal Statement, pursuant to Appellate Rule 2(C)(1), Indiana Rules of Appellate Procedure, in order to perfect their appeal from the Findings and Charging Order. This new appeal was assigned Cause No. 06A01-8711-CV-275 ("Appeal 275"). After a pre-appeal conference, the Court of Appeals issued an order on pre-appeal conference ("Pre-Appeal Order") on March 2, 1988, which consolidated Appeal 151 and Appeal 275 under the existing Appeal 151. The Pre-Appeal Order also determined that the issues originally raised in Appeal 151 relating to the Writ of Execution and the March 12 Order were moot and eliminated from consideration.[1]

Petitioners appealed this ruling to the Court of Appeals, preserving for review the federal constitutional questions raised herein: Whether it was a violation of Marguerite's right to due process and whether the Indiana courts denied full faith and credit to Arizona's community

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[1] Thus, it was a mistake for the Court of Appeals to state in its Opinion that those issues were still pending and were to be decided. *Jackson v. Russell,* 533 N.E.2d 153, 154 (Ind. App. 1989). In fact, it appears that a confusion among briefs (between the original Appeal 151 and the later consolidated Appeal 275) led the Court of Appeals to examine the wrong Brief for Appellants when deciding the federal issues.

property laws when the Trial Court permitted execution on C. W. Jackson's partnership interest in Jackson Plastics, in which Marguerite has an indivisible one-half interest, to satisfy the judgment only against C. W. Jackson. *See* Assignment of Error, dated March 18, 1988, § II, p. 4; § III, p. 5; Brief for Appellants, dated May 18, 1988, § II(C), pp. 28–29.

On July 5, 1988, Russell filed a cross-appeal appealing the Trial Court's Findings that the Jacksons' personal property stock interests in Como Plastics Corporation were not subject to execution because they were their community property.

On January 17, 1989, the Court of Appeals rendered its Opinion. The Court of Appeals not only affirmed the Trial Court's Findings that the partnership interests could be executed upon by Russell thereby again denying Marguerite due process of law and refusing to give full faith and credit to Arizona law, but also reversed the Trial Court's Findings on the Como Plastics Corporation stock issue, thus compounding Indiana's failure to give full faith and credit to Arizona community property law. *Jackson v. Russell,* 533 N.E.2d 153, 155–57 (Ind. App. 1989), App. A.

Thereafter, a timely Petition for Rehearing was filed on February 6, 1989 which raised the following federal issue: "Whether [the Indiana Court of Appeals] erred – and was in conflict with prior opinions and rulings of this Court, of the Indiana Supreme Court, and of the United States Supreme Court – when it erroneously decided that an Indiana judgment creditor (George E. Russell) could execute on property in which a nonresident (Marguerite L. Jackson) has an indivisible interest pursuant to the law of another state (Arizona), even though the judgment creditor does not have a judgment against the non-resident;" subsuming under that issue, *inter alia,* the following: "Whether [the Court of Appeals' Opinion] to permit Russell to execute on the community property of Marguerite L. Jackson contravened Indiana's obligation under the Full Faith and Credit Clause of the United States Constitution, Art. IV, § 1, to

give full faith and credit to the substantive law of the State of Arizona;" and "Whether [the Court of Appeals' Opinion] was an error of law and a violation of Marguerite L. Jackson's right to due process when it permitted George E. Russell to execute upon Marguerite L. Jackson's partnership interest in Jackson Plastics and upon Marguerite L. Jackson's interest in Como Plastics Corporation stock, in which she has an indivisible one-half interest, in order to satisfy a judgment only against C. W. Jackson." Appellants' Brief in Support of Petition for Rehearing, Statement of the Issues, pp. 1–2; § I, pp. 12–37. The Court of Appeals denied the Petition for Rehearing without opinion or comment on March 7, 1989. *See* App. B. A timely Petition for Transfer to the Supreme Court of Indiana,[2] raising the same federal issues, was denied without opinion or comment on September 26, 1989. *See* App. C; *see also* Appellants Brief in Support of Petition for Transfer, Statement of the Issues, p. 1, § II pp. 14–38. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

A. INDIANA HAS FAILED TO GIVE FULL FAITH AND CREDIT TO ARIZONA COMMUNITY PROPERTY LAW AND HAS DEPRIVED MARGUERITE OF DUE PROCESS OF LAW IN DEROGATION OF THE APPLICABLE DECISIONS OF THIS COURT.

This case raises the fundamental issue of whether the full faith and credit clause of the United States Constitution requires a non-community property forum state to recognize the community property law of a sister state

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[2] The Supreme Court of Indiana grants Petitions for Transfer in civil cases on a purely discretionary basis. Appellate Rule 11, Indiana Rules of Appellate Procedure.

with respect to the ownership of personal property of a resident of the community property state. In the present case, Indiana has refused to recognize the ownership rights of Marguerite L. Jackson existing under Arizona statutory and common law, on the grounds that a forum state has the "jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts." *Jackson v. Russell,* 533 N.E.2d at 155, App. A. For the reasons stated below, this Court should grant certiorari to decide whether the approach of the Court of Appeals contravenes the full faith and credit clause of the U.S. Constitution, and whether non-community property forum states must recognize community property ownership interests even when they enforce judgments by their own residents. Because eight states[3] subscribe to community property law, this is obviously an important issue for the Supreme Court to resolve. This case also provides an important opportunity for this Court to define the separate reach of the full faith and credit and due process clauses in choice of law situations.

Preliminarily, it should be noted that this Court has recently viewed this general subject area as suitable for its attention. In particular, this Court has rendered two decisions in the 1980s that address the issue of constitutionality of state choice of law decisions. *Allstate Insurance Co. v. Hague,* 449 U.S. 302, *reh'g denied,* 450 U.S. 971 (1981); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985).[4]

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[3] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

[4] Commentators have also been avidly interested in this subject. *See* Allo, *Allstate Insurance Co. v. Hague: An Unprovided-for-Case in the Supreme Court,* 32 Case W. Res. 1 (1981); Hill, *Choice of Law and Jurisdiction in the Supreme Court,* 81 Colum. L. Rev. 960 (1981); Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity,* 62 N.Y.U. L. Rev. 651, 654 (1987); Korn, *The Choice-of-Law Revolution: A Critique,* 83 Colum.

In the first case, the Court upheld the forum's selection of its own law to substantively govern the case,[5] and in the second, it invalidated such choice of law under the due process and full faith and credit clauses.[6] In both cases, the opinion (technically, the plurality opinion in the *Allstate* case) did not differentiate between full faith and credit and due process analysis. *Allstate Insurance Co. v. Hague,* 449 U.S. at 320–21; *Phillips Petroleum Co. v. Shutts,* 472 U.S. at 821–22; Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law,* 79 Mich. L. Rev. 1315, 1329 (1981); Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity,* 62 N.Y.U. L. Rev. 651, 654 (1987); Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws,* 60 S. Cal. L. Rev. 1299, 1300 (1987).

Justice Stevens, however, in his concurring opinion in *Allstate,* emphasized that the full faith and credit clause

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L. Rev. 772 (1983); Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws,* 60 S. Cal. L. Rev. 1299 (1987); Reese, *Legislative Jurisdiction,* 78 Colum. L. Rev. 1587 (1978); Sedler, *Constitutional Limitations on Choice of Law; The Perspective of Constitutional Generalism,* 10 Hofstra L. Rev. 59, 80 (1981); *Symposium: Choice of Law,* 14 U.C. Davis L. Rev. 837 (1981).

[5] In *Allstate,* this Court (plurality) held that the application of substantive Minnesota insurance law to a lawsuit was permissible because Minnesota had significant enough contacts, creating state interests, such that choice of its substantive law was neither arbitrary nor fundamentally unfair. *Allstate,* 449 U.S. at 320.

[6] In *Shutts,* this Court held that the application of Kansas law to every claim in a class action violated both the full faith and credit and due process clauses of the United States Constitution, in view of the state's lack of interest in many of the claims involved and the substantive conflict of its laws with the pertinent laws of other jurisdictions. *Shutts,* 472 U.S. at 822.

has a scope and application separate from the due process clause:

> I realize that both this Court's analysis of choice-of-law questions and scholarly criticism of those decisions have treated these two inquiries as though they were indistinguishable.
>
> Nevertheless, I am persuaded that the two constitutional provisions protect different interests and that proper analysis requires separate consideration of each.
>
> The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation. . . . The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty.

449 U.S. at 321–22.

The distinction between the two clauses has been recognized by commentators:

> The command of due process is essentially negative; it forbids a state from applying its own law or even the law of another state, in situations where no reasonable basis exists for doing so. On the other hand, the command of full faith and credit is affirmative; it compels a state in certain circumstances to entertain suit on a sister state claim and in other circumstances to apply the law of a given state

> even though the law of two or more other states could permissibly be applied under due process.

Reese, *Legislative Jurisdiction,* 78 Colum. L. Rev. 1587, 1590 (1978). *See* Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws,* 60 S. Cal. L. Rev. 1299, 1300, 1311 (1987).

This distinction is critical in cases such as ours, which involve the recognition of personal property rights established under the law in one state. In cases such as *Allstate* and *Shutts,* which involve the selection of one state's substantive law to apply to a legal dispute, it is understandable for the Court to follow an essentially "due process" approach of determining whether the forum state has sufficient contacts with the legal dispute to justify the application of its own law. Where, as here, however, one state intentionally ignores property rights established in another, there is a compelling need to give independent application to the full faith and credit clause. As shown below, this is demanded both by legal precedent and sound constitutional policy.

First, the precedent: It is ironic that the Court of Appeals relied on this Court's decision in *Clark v. Williard,* 294 U.S. 211 (1935), to justify its refusal to apply Arizona community property law. *Clark v. Williard* demands exactly the contrary. Interestingly, there are two *Clark v. Williard* decisions.[7] Indiana chose to focus on the irrelevant dictum of the second decision, and chose to ignore the dispositive holding of the first decision. *Clark v. Williard* involved a dispute between the insurance commissioner of Iowa (who was the successor to an insolvent Iowa insurance company which owned assets in Montana) and various judgment creditors who were pursuing the Montana assets of the insolvent company. Originally, although the insurance commissioner

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[7] The first *Clark v. Williard* is reported at 292 U.S. 112 (1934). The second is reported at 294 U.S. 211 (1935).

in Iowa claimed that he was the "universal successor" to the insolvent insurer in Iowa, the Montana Supreme Court held that the Montana law conferred upon him only the status of a chancery receiver, with the result that his "title" to the personal property was less than a full successor. As recognized in the second opinion, this Court in the first *Clark v. Williard* case held that Montana, pursuant to the full faith and credit clause, was required to respect the nature of the title and ownership conferred by Iowa law with respect to the personal property located in Montana, stating:

> We held that under the statutes of Iowa the liquidator was the successor to the corporation, and not a mere custodian, and that in ruling to the contrary the Supreme Court of Montana had denied full faith and credit to the statutes of a sister state.

294 U.S. at 212 (1935), describing *Clark v. Williard,* 292 U.S. 112 (1934).

This holding governs our case. As explained in more detail below, the Indiana courts permitted an Indiana judgment creditor to execute on indivisibly-owned community property of Marguerite, an Arizona resident, against whom no judgment had ever been rendered in favor of Russell. Under undisputed Arizona law, Marguerite had an indivisible interest in the community property here involved, and no creditor of her spouse had the right to invade or impair such interest. The Court of Appeals, however, in order to create a remedy against C. W. Jackson, Marguerite's spouse, held that an Indiana resident, Russell, could execute on Arizona community property even though he had knowingly failed to name Marguerite in the original lawsuit against C. W. Jackson. This refusal to recognize personal property ownership rights established under a sister state's law directly contravenes *Clark v. Williard* and strikes at

the heart of the policy underlying the full faith and credit clause.[8]

It should be noted that the second opinion in *Clark v. Williard* in no way supports Indiana's abrogation of Arizona law. In the second case, Montana did not dispute that the commissioner owned the property in question. Accordingly, the second opinion in *Clark v. Williard* simply holds that although the commissioner possessed the rights of a full successor to the property (*i.e.*, he owned the property), this did not prevent judgment creditors from executing on the property *to the same extent* that they could have executed on it against the predecessor corporation:

> If the corporation were still in being, and still the owner of the assets, its ownership would be subordinate to the process of the local courts.
>
> * * *
>
> . . . [H]is position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors.

294 U.S. at 213–14.

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[8] Apart from *Clark v. Williard*, this Court has held on a number of occasions that the full faith and credit clause or due process limits a state court's choice of law selection. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932); *Modern Woodman of America v. Mixer*, 267 U.S. 544 (1925); *New York Insurance Co. v. Dodge*, 246 U.S. 357 (1918); *Supreme Counsel of the Royal Arcanum v. Green*, 237 U.S. 531 (1915); *New York Life Insurance Co. v. Head*, 234 U.S. 149 (1914); *Atchison T. & S. F. Ry. v. Sowers*, 213 U.S. 55 (1909); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Chicago & Alton Railroad v. Wiggin Ferry Co.*, 119 U.S. 615, 622 (1877).

It is thus clear that the second opinion in *Clark v. Williard* is not inconsistent with the holding of the first opinion that the forum state must give full faith and credit to property rights established under the laws of a sister state. It is equally clear that this Court did not hold or indicate that a forum state is free to change the nature of the ownership of the non-resident's title to the property in question. This Petition should thus be granted to correct Indiana's misapplication of *Clark v. Williard.*

Furthermore, the policies underlying the full faith and credit clause support the necessity of correcting Indiana's abrogation of this constitutional principle here. It has been recognized that full faith and credit furthers a number of important constitutional issues. First, it sets a definite limit on the parochial application of forum law in abrogation of other state's law. *See* Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws,* 60 S. Cal. L. Rev. 1299, 1323 (1987); Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity,* 62 N.Y.U. L. Rev. 651, 677 (1987); *cf.* Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice of Law Constraints After Allstate Insurance Co. v. Hague,* 10 Hofstra L. Rev. 103, 110 (1981).

In addition, and most fundamentally, it protects the autonomy and sovereignty of states to establish rights and interests that ought not be ignored elsewhere. Professor Pielemeier aptly summarizes this important principle:

> Any constitutional compulsion to apply another state's law should accordingly be premised on constitutional recognition of the sovereign autonomy of the states *inter sese.* One reason to give force to the requirement of full faith and credit to laws is that such constitutional recognition of interstate autonomy clearly exists, both texturally and structurally.

* * *

> Finally, the political structure put into place by the Constitution illustrates both the constitutional importance of interstate autonomy and the need for a judicial mechanism to protect against infringement of that autonomy. This political structure gives states political influence over assertions of power by the federal government, but provides no similar influence over assertions by other states. Failure to impose effective judicial checks on state assertions of power through application of their laws thus leaves a wide gap in a constitutional structure otherwise permeated by checks and balances.

Pielemeier, *supra*, at 1311–1313, *see also Allstate Insurance Co. v. Hague*, 449 U.S. at 320–32 (Stevens, J., concurring).[9]

As noted above, this interest is especially important in a case such as ours. This case does not simply involve the selection of substantive law from among states with competing interests in its application. Rather, this case poses the critical question of whether property rights established in one state must receive recognition in another. Indiana has said that it will not recognize Arizona community property law. The full faith and credit clause, however, requires Indiana to reach a contrary conclusion.

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[9] Indeed, it has been convincingly argued that although there initially were three means of protecting the autonomy of state laws (*i.e.*, diversity jurisdiction, due process and full faith and credit), the requirement of full faith and credit "today stands alone as a mechanism to give this value practical effect." Pielemeier, *supra*, at 1322. ("Thus, if the protection of individual state autonomy is to remain a value reflected in constitutional law, its effectuation must be through a principled application of full faith and credit limitations on choice of law." Pielemeier, *supra*, at 1322.)

Last, although this case is principally a "full faith and credit" case, Indiana's denial of full faith and credit also denies Marguerite due process of law. As explained below, Marguerite had vested Arizona state community property rights in the stock and partnership interests here involved. Although Russell obtained an Indiana judgment against C. W. Jackson, he never obtained one against Marguerite because he knowingly chose not to make her a defendant in the lawsuit. Under Arizona law (as demonstrated below), community property is "indivisible"; hence a judgment creditor cannot execute upon it unless he has a judgment against both spouses. By failing to give full faith and credit to Marguerite's community property rights, the Court of Appeals has permitted a taking of Marguerite's property "without due process of law." Her property is being stripped from her even though she never had an opportunity to defend the merits of the underlying claim against her and has never had a judgment rendered against her. This is the essence of a denial of due process. *Hansberry v. Lee,* 311 U.S. 32 (1940); *Vikse v. Johnson,* 137 Ariz. 528, 672 P.2d 193, 195 (App. 1983); *Garn v. Garn,* 155 Ariz. 156, 745 P.2d 604, 607–08 (App. 1987).

The foregoing discussion postulates that Arizona law establishes indivisible property rights on behalf of Marguerite. The succeeding sections so demonstrate, and further illuminate the constitutional violation here involved.

B. ARIZONA COMMUNITY PROPERTY LAW CREATES AN INDIVISIBLE RIGHT OF EACH SPOUSE TO ALL COMMUNITY PROPERTY.

It is undisputed that Arizona community property law, both statutory and case law, establishes that each spouse has an indivisible interest in each item of community property owned by them. *See* A.R.S. § 25-215; *Vikse v. Johnson,* 672 P.2d at 195–96; *Garn v. Garn,* 745 P.2d at 607-08. Accordingly, it is established Arizona law that a judgment

creditor of one spouse has no right to execute on the community property of the spouses pursuant to a judgment obtained against only one of them. *See Vikse,* 672 P.2d at 195 ("Our Supreme Court decided in *Eng v. Stein,* 123 Ariz. 343, 599 P.2d 796 (1979) that a judgment entered against a wife who had neither been served nor named, and had not appeared, was void insofar as it attempted to bind her or the community. We reach the same result in the instant case. . . . Due process requires that a party be given notice of an adverse claim and an opportunity to defend."); *Garn,* 745 P.2d at 607–08 ("Elementary principles of due process require that before any person may have a valid judgment entered against him, that person must have reasonable notice and an opportunity to appear and defend. *Cravens, Dargan & Co. v. Superior Court,* 153 Ariz. 474, 737 P.2d 1373 (1987). The same considerations exist in the context of one's community property. . . . [B]oth spouses have their own separate right to reasonable notice and an opportunity to be heard before a valid judgment against the community may be entered."). Obviously, to execute on the community property, the creditor need only sue and be awarded judgment against both spouses. *See Vikse,* 672 P.2d at 195 ("All that needed to be done here, assuming community liability, was to join both spouses in the Minnesota lawsuit.").

C. RECOGNITION OF ARIZONA LAW DOES NOT CONTRAVENE FUNDAMENTAL POLICY OF INDIANA.

In the Indiana courts, Russell persistently sought to portray Marguerite's reliance on community property as an effort to "cheat" Russell. In the same vein, Russell argued that giving effect to Arizona community property law is contrary to the policy of non-community property Indiana. In reaching its decision, the Court of Appeals echoed this theme by stating that "marital property should not be used as a device to cheat creditors." *Jackson v. Russell,* 533 N.E.2d at 155, App. A.

Naturally, a forum state court is not obligated to apply another state's law that materially impairs the fundamental policy of the forum state. *See Nevada v. Hall,* 440 U.S. 410, *reh'g denied,* 441 U.S. 917 (1979); *Bradford Electric Light Co. v. Clapper,* 286 U.S. 145, 159–60 (1932). But here, there is no rational basis for finding such repugnancy. To the contrary, Indiana recognizes the dispositive rule of law here involved (*i.e.,* that a creditor must obtain a judgment against both spouses in order to have the right to execute on jointly owned spousal property) with respect to spousal real property and the proceeds thereof held as tenancy by the entireties.[10]

It is undisputed in Indiana that each spouse has an indivisible ownership interest in *all* of an estate held by the entireties, and that a separate creditor of one spouse has no right to execute on any portion of the tenancy by the entireties property. *Davis v. Clark,* 26 Ind. 424 (1866); *Sharp v. Baker,* 51 Ind. App. 547, 96 N.E. 627 (1911); *Eilts v. Moore,* 117 Ind. App. 27, 68 N.E.2d 795, 796 (1946) ("In this state, a conveyance of real estate to husband and wife creates an estate by the entirety which is immune to seizure in satisfaction of the individual debts of either."); *Enloe v. Franklin Bank and Trust Co.,* 445 N.E.2d 1005, 1009 (Ind. App. 1983) ("An estate by the entireties is immune to seizure for the satisfaction of the individual debt of either spouse. *Eilts v. Moore,* 117 Ind. App. 27, 68 N.E.2d 795 (1946). In effect, the estate by the entireties is an entity separate from the individual estates of the spouses."); *In re Jeffers,* 3 B.R. 49,

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[10] Indiana recognizes "tenancies by the entireties" law (which is a form of spousal ownership similar to community property) for real property (as well as the personal property proceeds of real property), but it does not recognize tenancies by the entireties for personal property, such as the stock and partnership interests here involved, unless such property is the "proceeds" of tenancy by the entirety real property. *See Whitlock v. Public Service Co. of Indiana,* 239 Ind. 680, 159 N.E.2d 280, 283 (1959).

52–53 (N.D. Ind. 1980) ("Because title to entireties property is held by the marital unity, either spouse alone can do no act to destroy the tenancy . . . and a creditor of one spouse may not seize, sell or attach the entireties properties, *or any interest therein,* under judicial process.") (Emphasis supplied.); *Myler v. Myler,* 137 Ind. App. 605, 210 N.E.2d 446 (1965). Clearly, a creditor of the husband alone cannot avoid this rule by arguing, as Russell has, that he only wants to execute on the husband's share (*i.e.,* one-half) of the property.

Furthermore, Indiana courts explicitly hold that proceeds from the sale of land held by the entireties are not subject to the separate debts of only one spouse. *Whitlock v. Public Service Co. of Indiana,* 239 Ind. 680, 159 N.E.2d 280, 283 (1959); *see also Koehring v. Bowman,* 194 Ind. 433, 142 N.E. 117, 118 (1924); *Fuston v. National Mutual Insurance Co.,* 440 N.E.2d 751, 753 (Ind. App. 1982). Thus, even Indiana recognizes that certain personal property may be indivisibly owned under Indiana law, and thus unavailable to the creditors of only one spouse.

Accordingly, both Arizona and Indiana law recognize that a judgment creditor cannot execute on property in which each spouse has an indivisible or inseverable interest unless he has a judgment against both spouses. Arizona's law in this regard can thus hardly be viewed as fundamentally contrary to Indiana's public policy.

The Opinion also suggests an equally spurious second "public policy" basis for ignoring Arizona law by its reliance on RESTATEMENT (SECOND) OF CONFLICTS § 258 comment h, which provides:

> Interests of Third Persons. The interests of a third person, such as a creditor or transferee, in a movable owned by one or both of the spouses, will be determined by the law that would be applied by the courts of the state where the movable was located at the time the

> interest is claimed to have been acquired. These courts would apply their own local law, rather than the local law of the state of the spouses' domicile, when required to do so by considerations of justice to the third person. This will be so when the third person has justifiably relied upon that state's local law (*see* § 259, comment c), as he is likely to have done if he is domiciled in the state.

Reliance on this Restatement comment is devoid of merit for several reasons. First, this Restatement principle represents a narrow (and here, inapplicable) exception to the uniformly recognized choice of law rule that the ownership of personal property is determined by the owner's marital domicile at the time of the acquisition of the property. *See Parrett v. Palmer,* 8 Ind. App. 356, 35 N.E. 713 (1893) ("The respective rights in their personal property acquired by husband and wife by their marriage are determined by the law of the place of their matrimonial domicile."); *In re Schick,* 149 Ind. App. 549, 274 N.E.2d 291 (1971); *Moore v. Livingston,* 148 Ind. App. 275, 265 N.E.2d 251 (1970); *People v. Bejarano,* 145 Colo. 304, 358 P.2d 866 (Colo. 1961) ("[U]nder generally accepted principles of conflict of laws, marital interests in movables acquired during marriage are determined by the law of the domicile when acquired, *and that community property retains its character* as such when it is removed to a common law state." (Emphasis supplied)); *Boyd v. Curran,* 166 F. Supp. 193 (S.D.N.Y. 1958) (California community property laws controlled question of whether decedent's widow, domiciled in California, had interest in benefits); *Commissioner of Internal Revenue v. Porter,* 148 F.2d 566 (5th Cir. 1945).

RESTATEMENT (SECOND) OF CONFLICTS § 258 comment h, recognizes an exception to this basic rule where a third party has "justifiably relied" on the application of local law "in acquiring an interest in property." It is clear that this section has absolutely no application to our situation. Here, Russell never even dealt with Marguerite or

C. W. Jackson with respect to those interests. Rather, Russell has simply sought to terminate Marguerite's indivisible rights in such community property even though he never sued Marguerite nor detrimentally relied on the nature of her ownership of such property. In short, RESTATEMENT (SECOND) OF CONFLICTS § 258 comment h cannot legitimately be relied upon as establishing a public policy requiring the abolishment of Marguerite's community property rights.

Finally, and most broadly, it certainly cannot be the case that community property law in general contravenes Indiana policy. Although Russell repeatedly made this argument below (and the Court of Appeals perhaps impliedly adopted it by virtue of its comment that "marital property should not be used as a device to cheat creditors"), there is absolutely no authority to support or legitimize this general rejection of community property law. Obviously, such a concept would wreak havoc in our federal system, with the eight community property states potentially warring with the remaining common law states. In fact, no court has ever embraced this destructive concept. Indeed, community property and common law states routinely apply the other's law to personal property ownership issues. *In re Estate of Perry,* 480 S.W.2d 893 (Mo. 1972) (Missouri court (non-community property state) held that Texas marital domicile law of community property invalidated claim of administrator to personal property that had been moved to Missouri from Texas during marriage); *Ladd v. Ladd,* 265 Ark. 725, 580 S.W.2d 696 (1975) (In case which involved New Mexico (community property state) spouses who moved to Arkansas (non-community property state), Arkansas court ruled that (i) rights in personal property in Arkansas governed by community property law of New Mexico and (ii) reconciliation agreement was illegal under the laws of New Mexico because it invalidly terminated community property rights of spouse); *Wallach v. Wallach,* 211 Ga. 745, 88 S.E.2d 154 (1956) (Although parties were presently residents of Georgia, the court applied community property

law of Texas (marital domicile at time of marriage) to determine rights in personal property (located in Georgia) which had not been divided by the marriage decree). In this connection, it is especially interesting that the Arizona Supreme Court has held that certain property was separate property (not community property) by applying the law of Morocco and Syria, the domicile of the spouses. *See Nationwide Resources Corp. v. Massabni,* 143 Ariz. 460, 694 P.2d 290, 294 (1984). Certainly, if Arizona gives effect to the law of Morocco and Syria, it is only fitting that Indiana be required to recognize the law of Arizona.

For the reasons stated above, there is no basis for concluding that Indiana public policy precludes the recognition of Arizona community property law.

D. INDIANA STATUTES DO NOT JUSTIFY THE ABROGATION OF ARIZONA LAW IN THIS CASE.

In eschewing Arizona law, the Court of Appeals relied on Indiana statutory provisions providing for the execution on partnership and stock interests. There are two fundamental reasons why this reliance was misplaced. First, technically, the statutes do not establish an Indiana state interest contrary to Marguerite's Arizona community property rights. Rather, the statutes are simply procedural execution statutes which dictate the mechanism whereby a judgment creditor executes on partnership and stock interests owned by the judgment debtor.[11] Nothing in either statute states or implies that this procedural mechanism can be used to extinguish substantive property rights of someone who is

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[11] The execution statute for partnership interests is the partnership law charging statute (I.C. 23-4-1-28) which is the charging statute provision of the Uniform Partnership Act. With respect to stocks, the applicable statute is I.C. 34-1-36-5, which provides the mechanism for a judgment creditor to levy on the stock of a judgment debtor.

not a debtor of the judgment creditor. As aptly described by an earlier Indiana court with respect to tenancy by the entireties, the judgment creditor of only one spouse has no right to execute on indivisibly owned joint property because "one man's property [here one woman's] cannot be sold and executed upon a judgment against another." *Sharp v. Baker*, 96 N.E. at 630–31. Neither the Court of Appeals nor Russell have cited any authority whatsoever which indicates that a partnership charging statute (or stock levy statute) authorizes execution on partnership or stock interests owned by a non-debtor.

Second, even assuming that these statutes are misread to authorize the invasion of Arizona community property rights, such an invasion runs afoul of full faith and credit. This is the nub of the constitutional issue here presented. As shown above, Arizona statutory (and case) law establish an indivisible ownership right of Marguerite in the stock and partnership interests here involved. This is a property right which Indiana is bound to respect under the full faith and credit clause of the United States Constitution. *See Clark v. Williard*, 292 U.S. 112 (1934); J. BEALE, *3 Cases on the Conflict of Laws* 517 (1901) ("A right having been created by the appropriate law, the recognition of its existence should follow everywhere."); Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 Yale L.J. 1291, 1294–1295. That Indiana has a connection with this matter is simply not enough to abrogate already-existing or "vested" property rights established under the law of another state. *See Clark v. Williard*, 292 U.S. 112 (1934); J. BEALE, *3 Cases on the Conflict of Laws* 517 (1901); Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 Yale L.J. 1291, 1294–1295. Simply put, Indiana must not be permitted to take Marguerite's property from her.

Indiana has improperly refused to recognize the foregoing constitutional principles, and this Court is now the last barrier to prevent (i) the resulting impairment of federalism flowing from the refusal to recognize Arizona community property law and (ii) the unfairness to Marguerite

L. Jackson, whose indivisible community property rights will be extinguished even though Russell has never obtained a judgment against her.

E. THIS CASE SHOULD BE REMANDED FOR DISPOSITION NOT INCONSISTENT WITH THIS COURT'S DECISION.

The Opinion held certain dispositions of property in this case to be fraudulent transfers. It is undisputed, however, that if the property in question was initially immune from execution, there could be no fraudulent transfer of it. *Lee Supply Corp. v. Agnew,* 818 F.2d 1284 (7th Cir. 1987); *Stamper v. Stamper,* 227 Ind. 15, 83 N.E.2d 184, 186 (1949) ("'It is impossible to conceive any logical ground upon which [the conveyance of] property not subject to the claims of creditors can be held to have been fraudulent.'" (quoting from *Blair v. Smith,* 114 Ind. 114, 15 N.E. 817, 823 (1888)); 14 I.L.E. *Fraudulent Conveyances* § 7 (1959).[12] If this Court agrees with the constitutional argument set forth in this Petition, the property in question would always have been immune from execution, and hence no transfer of it could be found to be fraudulent. This Court should thus remand this case for disposition by the Indiana courts consistent with the conclusion that the Opinion violated the constitutional safeguards of full faith and credit and due process of law.

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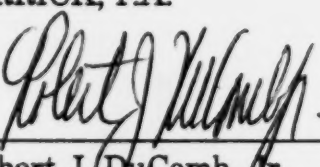
[12] That the Jacksons' community property is immune from execution and that any transfer of such immunized community property cannot be fraudulent under Indiana law was recognized by the Trial Court. It held that all of the stock interests here involved were immune from execution and hence could not be fraudulently transferred. *See* Findings, App. D.

CONCLUSION

As amply demonstrated herein, Indiana has refused to comply with its obligation under the United States Constitution to accord full faith and credit to Arizona's community property law. In so refusing, Indiana has also deprived a United States citizen of her rights of constitutional due process – all in derogation of the applicable decisions of this Court. The reversal of Indiana's Opinion is thus necessary to advise the courts of all states that vested state law property rights (be they community or otherwise) are entitled to protection wherever a citizen travels in these United States. Accordingly, for all of the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

SACKS, TIERNEY, KASEN & KERRICK, P.A.

By 

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APPENDIX A

COURT OF APPEALS OF INDIANA

OPINION

January 17, 1989

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IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

C. W. JACKSON,	)	
	)	
Appellant/Cross-Appellee (Defendant Below),	)	
	)	
and	)	
	)	
JACKSON PLASTICS COMPANY; EXCELARIUM PRODUCTS CORPORATION; COLUMBUS AIR CORPORATION; TIGER DEVELOPMENT COMPANY and MARGUERITE L. JACKSON,	)	NO. 06A01-8606-CV-151
	)	
Appellants/Cross-Appellees (Garnishee-Defendants Below),	)	
	)	
-v-	)	
	)	
GEORGE E. RUSSELL,	)	
	)	
Appellee/Cross-Appellant (Plaintiff Below)	)	

APPEAL FROM THE BOONE CIRCUIT COURT
The Honorable Ronald E. Drury, Judge
Cause No. C82-228

ROBERTSON, J.

This appeal arises from proceedings supplemental in a lawsuit awarding a $2,000,000 judgment to the now

appellee-judgment creditor George E. Russell. The now appellant-judgment debtor C. W. Jackson appeals from trial court rulings made in the proceedings supplemental. The original trial proceedings were affirmed by the opinion of this court. *See, Jackson v. Russell* (1986), Ind.App., 498 N.E.2d 22. Rehearing and transfer were denied in that appeal.

After judgment was entered, C. W. Jackson and his wife, Marguerite L. Jackson, completed a series of transactions involving property they owned. These transactions form the bulk of the facts involved in this appeal.

The Jackson transfers began about two months after the entering of the $2,000,000 judgment. The Jacksons owned all of the stock of Como Plastics, an Indiana corporation. The building and the real estate of Como Plastics, located in Bartholomew County, Indiana, were owned by Jackson Plastics Company which is an Indiana general partnership in which C. W. Jackson and his wife are equal partners. Jackson Plastics Company was specifically created in 1980 for the purpose of owning the real estate and improvements thereon which were to be leased to Como Plastics. Jackson Plastics also owned a parcel of real estate next to the property occupied by Como Plastics, and two Beech aircraft. In November, 1984, Jackson Plastics transferred title to one of the aircraft to Columbus Air Corporation, an Arizona corporation in which the Jacksons owned all of the stock. Transfer was made by a bill of sale signed by the Jacksons as general partners of Jackson Plastics. No money changed hands as a part of this transfer, although it appears that Columbus Air assumed the debt on the airplane. Shortly thereafter, title to the second airplane was transferred to Columbus Air Corporation under very similar circumstances. At about the same time Jackson Plastics transferred the parcel of real estate next to the Como Plastics plant to Tiger Development Company, which is an Arizona partnership. The Jacksons owned half of Tiger Development with the other half being owned by Lincoln Meadows Corporation, an Indiana corporation. Lincoln

Meadows stock was owned entirely by the Jacksons. Tiger paid no money for the real estate. In early 1985, Jackson Plastics, by way of a quitclaim deed, transferred the property occupied by Como Plastics to C. W. Jackson and Marguerite Jackson as "husband and wife as their community property." The deed recited that the transfer was made for $10 and other consideration. After the above transfers were completed, Lincoln Meadows merged with Excelarium Products Corporation, an Arizona corporation, with all of the stock being owned by the Jacksons. Como Plastics was also merged into Excelarium a little later. In both mergers no money was exchanged, however, both Jacksons received additional Excelarium stock. There are also a few parcels of real estate located in Indiana owned by the Jacksons as husband and wife. No transfers involving these parcels were made during this period.

It should also be noted that the Jacksons had been married for 40 years or more and since 1969 they resided in Arizona, a community property state. Mrs. Jackson was not a party to the original lawsuit.

The appeal and the cross-appeal stems primarily from a trial court order which held, among other things, that the partnership interest of C. W. Jackson in Jackson Plastics was a separate and distinct individual interest and subject to execution by Russell but Russell did not have a lien on the shares of stock of Como, Lincoln Meadows or Excelarium and those shares were not subject to execution. The trial court also found that the transfers of the two airplanes and the conveyance of the two parcels of real estate in Bartholomew County to be fraudulent.

Jackson states the issues on appeal as being:

1. Whether the trial court erred, as a matter of law, when it denied Jackson's Motion to Quash or Modify the Writ of Execution on March 17, 1986.

2. Whether the trial court's Order in Proceedings Supplementary of March 12, 1986, is supported by sufficient evidence or is erroneous as a matter of law.

3. Whether the enforcement of the Judgment against Marguerite L. Jackson violates her constitutional right to due process.

Jackson argues the first two issues jointly with the thrust of the arguments being that the proceeds of the real estate held as tenants by the entireties are not subject to the separate debts of one spouse and that the proceeds and profits from the sale of the real estate are community property and not subject to judicial execution of one of the spouses.

Initially, we deem it proper to examine the post-judgment property transfers in the context of the trial court's finding that they were fraudulently made.

IND. CODE 32-2-1-14 reads:

All conveyances or assignments, in writing or otherwise, of any estate in lands, or of goods or things in action, every charge upon land, goods or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay or defraud creditors or other persons of their lawful damages, forfeitures, debts or demands, shall be void as to the person sought to be defrauded.

Case law has developed a "badges of fraud" test to identify occurrences indicative of a fraudulent intent on the part of those making the transfers. These characteristics are summarized in *Arnold v. Dirrim* (1979), Ind.App., 398 N.E.2d at 446, 447:

> Among the most common indicia of fraud is the transfer of property by a debtor during the pendency of a suit against him, especially where the transfer renders the debtor insolvent or greatly reduces his estate. . . . Evidence of a series of contemporaneous transactions the result of which is to strip a debtor of all his property available for execution is not an ordinary transaction and is therefore a badge of fraud. . . . Another reliable indication of fraudulent intent is the presence of secret or hurried transactions not in the usual mode of doing business. Indeed any transaction conducted in a manner differing from customary methods may be fraudulent. It is also a badge of fraud that the debtor retains benefits over the property transferred. One may not be the beneficial owner of property and still have it exempt from his debts. . . . Furthermore the fact that no consideration was given or that the consideration was greatly below the value of the property is recognized as a prime factor in determining whether a transaction is to be deemed fraudulent. . . . Finally, a transfer of property between members of a family may evince a fraudulent intent. (Citations omitted.)

The concurrence of several of the badges of fraud allows affirming the trial court. *Jackson v. Farmers State Bank* (1985), Ind. App., 481 N.E.2d 395, *trans. denied.*

An examination of the post-judgment Jackson transfers, as previously recounted in this opinion, shows that they comfortably fit within the *Arnold* indicia of fraud. Even though Jackson sets forth legitimate business purposes for each of the transactions, a pure motive on the part of the debtor in making a fraudulent transfer will not cleanse the transaction. *Gable v. Columbus Cigar Co.* (1895), 140 Ind. 563, 38 N.E. 474.

Turning to the next step, we note that every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts. *Clark v. Willard* (1935), 294 U.S. 211, 55 S.Ct. 356. In Indiana the applicable statute is section 28 of the Indiana Uniform Partnership Act, which reads:

> (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

I.C. 23-4-1-28 (1)

Jackson's arguments about community property notwithstanding, the overriding facts are that Jackson is a partner in an Indiana partnership whose assets are located in Indiana. I.C. 23-4-1-28 speaks directly and without equivocation to the fact situation present in this appeal. Moreover, a partner's interest in the partnership is personal property. I.C. 23-4-1-26.

Viewed from a different perspective, marital property should not be used as a device to cheat creditors. R. Leflar, *American Conflicts Law* (3rd Ed. 1977) at p. 474. This position is supported by comment (h), *Restatement* (2d) Conflict of Laws § 258, which reads:

> *Interest of Third Persons.* The interests of a third person, such as a creditor or transferee,

> in a moveable owned by one or both of the spouses will be determined by the law that would be applied by the courts of the state where the moveable was located at the time the interest is claimed to have been acquired. These courts would apply their own local law, rather than the local law of the state of the spouses' domicile, when required to do so by considerations of justice to the third person. This will be so when the third person has justifiably relied upon that state's local law . . ., as he is likely to have done if he is domiciled in the state.

In sum, we are of the opinion that Jackson has a properly rendered judgment against him and that Indiana law makes Jackson's partnership interest in Jackson Plastics subject to execution in satisfying that judgment. It also follows that our decision does not effect the property of Marguerite L. Jackson thereby rendering Jackson's third issue relating to due process moot.

On cross-appeal Russell raises the issue of whether the trial court erred in finding that Jackson's stock in Indiana corporations was not subject to execution. The thrust of the trial court's ruling was that the stock was personal property and subject to the law of the domicile of the owner. As a result, the stock was community property prior to the transfers, not subject to execution, and therefore, it could not be fraudulently conveyed. A reading of the trial court's conclusions gives every indication that the transfers by Jackson of this stock were also fraudulent, in the sense that it jeopardized the judgment creditor, although the trial court stopped short of making a finding in that regard.

The original stock in Como Plastics was held by Jackson and his wife as joint tenants with rights of survivorship as indicated by the stock certificates and the stock transfer ledger of the corporation. The recent case of *United States v. Capital Savings Association,* (N.D. Ind. 1983), 576 F.Supp.

790 held that under Indiana law a joint account may be subject to claims to the extent of the debtor-party's interest. We believe it to be the general rule that personal property held by joint tenants can be reached by a creditor. *See,* 48A C.J.S. §32, *Joint Tenancy.*

We are of the opinion that I.C. 34-1-36-5 controls under the facts before us. That statute provides a procedure for a judgment creditor to enforce the statutory lien created by that statute. It reads:

> Shares of stock in any corporation or company may be levied upon and sold in the county where the office and books, showing the shares of stock and stockholders of the corporation or company are kept; and the sheriff shall transfer the stock, subject to the rights of the corporation or company. The sheriff shall transfer the stock, subject to the rights of the corporation or company. The sheriff shall have access to the books of any corporation or company in his county; for the purpose of making the levy, and, if refused access, the court shall enforce the right. The shares of stock subject to be levied upon, shall be bound by the execution from the time of the levy, and when such levy is made, the sheriff shall leave the notice thereof with the officers of the company, and such levy shall constitute a lien upon the stock from the time of such levy.

Under the facts of this case, we are dealing with shares of stock in an Indiana corporation whose assets are located entirely in Indiana and which are owned by joint tenants. It is our belief that, by reason of our determination of the prior issue, Jackson's shares of that stock are also subject to execution by the judgment creditor pursuant to I.C. 34-1-36-5.

The parties have mentioned two other issues: the

denial of a motion for change of judge which was filed by the garnishee-defendants Jackson Plastics Company, Excelarium Products Corporation, Columbus Air Corporation, Tiger Development Company and Marguerite L. Jackson and made pursuant to Ind. Rules of Procedure, Trial Rule 76, and the denial of a demand for trial by jury which was filed by C. W. Jackson pursuant to T.R. 38 and constitutional provisions. Our examination of the record does not reveal that either of these issues was included in a motion to correct error; neither do we find the issues were argued in the appellant Jackson's original brief. Clearly, in the latter instance the failure to argue an issue in the appellant's brief amounts to a waiver, A.R. 8.3(A)(7), as does the failure to include the issue in a motion to correct error. *Indiana Dept. of Mental Health v. State ex rel. Southlake Center for Mental Health, Inc.* (1984), Ind.App., 467 N.E.2d 1256. Even so, neither contention has merit. It is conceded that Jackson's jury trial demand was not timely made. Jackson's argument, which initially appears in his reply brief, that the addition of the garnishee-defendants in the form of new parties elevates form over substance when it is considered that the Jacksons are the sole owners of the purported new parties. The general rule applicable to this case is that proceedings supplemental are but a continuation of the original proceedings with the result that changes of judge or venue are not available. *See, Citizens Nat. Bank of Grant County v. Harvey* (1976), 167 Ind.App. 582, 339 N.E.2d 604.

We reverse the trial court's decision as it relates to the Como Plastics stock and remand for further proceedings consistent with this opinion. We affirm the trial court in all other regards.

RATLIFF, C. J. AND CONOVER, P. J. CONCUR.

APPENDIX B

COURT OF APPEALS OF INDIANA

DENIES PETITION FOR REHEARING

March 7, 1989

Daniel Rock Heiser, Clerk
Clerk of the Supreme Court
State of Indiana
Court of Appeals and Tax Court
217 State House
Indianapolis, IN 46204

Peter Lawrence Obremskey
P.O. Box 666
225 W. Main
Lebanon, IN 46052-0000

Cause Number: 06A01-8606-CV-00151
Lower Cause: C 82-228, Cir.

C.W. Jackson vs. George E. Russell and PPG Industries, Inc.

You are hereby notified that the Court of Appeals has on this day 3/07/89:

Appellants' Petition for Rehearing denied. Wesley W. Ratliff, Jr., Chief Judge.

WITNESS my name and the seal of said Court, this 7th day of March, 1989.

/s/ Daniel Rock Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

APPENDIX C

SUPREME COURT OF INDIANA

DENIES PETITION TO TRANSFER

September 26, 1989

Daniel Rock Heiser, Clerk
Clerk of the Supreme Court
State of Indiana
Court of Appeals and Tax Court
217 State House
Indianapolis, IN 46204

Robert James DuComb, Jr.
CitiBank Tower, 20th Floor
3300 N. Central Avenue
Phoenix, AZ 85012-2576

Cause Number: 06A01-8606-CV-00151
Lower Cause: C 82-228, Cir.

C.W. Jackson vs. George E. Russell and PPG Industries, Inc.

You are hereby notified that the Supreme Court has on this day 9/26/89:

Appellants' Petition for Transfer is hereby denied. Randall T. Shepard, Chief Justice. All Justices concur.

Appellants' Petition for Oral Argument is hereby denied. Randall T. Shepard, Chief Justice. All Justices concur.

Verified Application to Amend Appellants' Brief in Support of Petition for Transfer is hereby denied. Randall T. Shepard, Chief Justice. All Justices concur.

WITNESS my name and the seal of said Court, this 26th day of September, 1989.

/s/ Daniel Rock Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

APPENDIX D

BOONE CIRCUIT COURT

BOONE COUNTY, INDIANA

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

October 14, 1987

STATE OF INDIANA)	IN THE BOONE
) SS:	CIRCUIT COURT
COUNTY OF BOONE)	CAUSE NO. C82-228
GEORGE E. RUSSELL,	)
	)
Plaintiff,	)
	)
v.	)
	)
C.W. JACKSON,	)
	)
Defendant.	)
	)
	)
	)
C.W. JACKSON,	)
	)
	)
Third-Party Plaintiff,	)
	)
v.	)
	)
PPG INDUSTRIES, INC.,	)
	)
Third-Party Defendant.	)
	)
	)

GEORGE E. RUSSELL,

Plaintiff-Judgment-Creditor,

v.

JACKSON PLASTICS COMPANY; EXCELARIUM PRODUCTS CORP.; COLUMBUS AIR CORP.; TIGER DEVELOPMENT COMPANY; MARGUERITE L. JACKSON; and G.L. INDUSTRIES, INC.,

Garnishee-Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Plaintiff George E. Russell having filed his Petition for Finding Of Fraudulent Conveyances, and the Court having read briefs, having heard testimony from judgment defendant C.W. Jackson in proceedings supplemental hearings on August 23, 1985, and March 7, 1986; having examined and considered judgment defendant's interrogatory answers and responses to request for production filed January 27, 1986, and June 5, 1986; and the Court having held a hearing on June 24 through June 26, 1987, where evidence was seen and heard by the Court; and the Court having read further briefs; the Court now being duly advised in the premises, hereby makes the following Findings of Fact, Conclusions of Law and Order in regard to Plaintiff's Petition:

FINDINGS OF FACT

I. GENERAL FACTS

1. Judgment in this case was entered on September 24, 1984, on behalf of George E. Russell ("Russell") and against C.W. Jackson ("Jackson") in the amount of $2,000,000.00 (Two Million Dollars).

2. The Defendant Jackson and Marguerite L. Jackson ("Marguerite") are husband and wife and have been married for more than forty years during which time they have lived together as husband and wife.

3. C.W. Jackson and Marguerite L. Jackson, husband and wife, (collectively "the Jacksons") resided and were domiciled in the State of Indiana until 1969, at which time they moved their residence and domicile to the State of Arizona.

4. The Jacksons have resided and have been domiciled in the State of Arizona continuously since 1969.

5. The Jacksons formed Jackson Plastics Company, an Indiana general partnership ("Jackson Plastics"), in October 1980.

6. The Jacksons incorporated and became the sole shareholders of Como Plastics Corporation ("Como"), an Indiana corporation, in 1980. On September 24, 1984, the Jacksons owned all of the shares of stock in Como.

7. During the time the Jacksons have been domiciled in Arizona, they formed, with others, Excelarium Products Corporation, an Arizona corporation ("Excelarium").

8. Although the Jacksons were not the sole shareholders of Excelarium when it was formed, they were the sole shareholders of Excelarium on September 24, 1984.

9. The Jacksons incorporated, with others, Lincoln Meadows Corporation ("Lincoln Meadows"), an Indiana corporation, prior to September 24, 1984.

10. Although the Jacksons were not originally the sole shareholders of Lincoln Meadows, they were the sole shareholders of Lincoln Meadows on September 24, 1984.

11. On September 24, 1984, the only general partners of Jackson Plastics Company were Jackson and his wife, Marguerite, each separately owning 50% of the partnership.

12. On September 24, 1984, the Jacksons and Lincoln Meadows owned all of the partnership interest in Tiger Development Company, an Arizona partnership ("Tiger").

13. On December 12, 1984, the Jacksons executed, as incorporators, the Articles of Incorporation of Columbus Air Corporation, an Arizona corporation ("Columbus Air"). The Articles of Incorporation were filed with the Arizona Corporation Commission on December 13, 1984.

14. The sole shareholders and the sole directors of Columbus Air at the time of its incorporation were C.W. Jackson and Marguerite L. Jackson. The Jacksons have owned all of the shares of stock of Columbus Air since its incorporation.

15. Prior to the entry of judgment in this case, Russell did not name or serve as a defendant, Marguerite L. Jackson. Russell first sought to name Marguerite in this action approximately thirteen months after the entry of judgment, which naming was invalidated by the Indiana Court of Appeals.

16. Russell does not have a judgment against Jackson Plastics or Tiger, and has never sought nor obtained a charging order upon Jackson's ownership interest in Jackson Plastics or Tiger.

17. Russell does not have a judgment against Como, Excelarium, Lincoln Meadows, Columbus Air, Marguerite Jackson or the Jacksons' marital community.

18. On January 3, 1986, a Writ of Execution was issued by the Clerk of Boone County, Indiana. At the time the January 3 Writ was issued, Jackson no longer owned any shares of stock in Como. Therefore, the execution lien never attached to any of Jackson's stock in Como.

19. The January 3 Writ was returned "unsatisfied" by the Sheriff of Bartholemew County, Indiana, and any lien which Russell may have had on the Como stock expired when it was returned unsatisfied.

20. There were six items of property transferred after the September 24, 1984, judgment herein, which conveyances Plaintiff Russell seeks to have the Court declare void as fraudulent conveyances pursuant to I.C. 32-2-1-14.

21. Those six conveyances were:

A. Real estate located at 2860 North National Road, Columbus, Bartholemew County, Indiana, commonly known as the Como Plastics plant; transferred February 21, 1985, from Jackson Plastics Company to C.W. Jackson and Marguerite L. Jackson, husband and wife.

B. Real estate adjacent to 2860 North National Road, Columbus, Bartholemew County, Indiana; transferred November 25, 1984, from Jackson Plastics Company to Tiger Development Company.

C. A 58TC Beech Baron Aircraft; transferred November 28, 1984, from Jackson Plastics Company to Columbus Air Corporation.

D. A Beech King Air 90 airplane; transferred November 27, 1984, from Jackson Plastics Company to Columbus Air Corporation.

E. The stock of Como Plastics Corporation; transferred March 11, 1985, from it's sole owners, C.W. and Marguerite Jackson, through merger to Excelarium Products Corporation.

F. The stock of Lincoln Meadows Corporation; transferred November 29, 1984, from it's sole owners, C.W. and Marguerite Jackson, through merger to Excelarium Products Corporation.

22. Therefore, four of the conveyances were from Jackson Plastics Company (an Indiana partnership whose two general partners were C.W. Jackson and Marguerite L. Jackson, each separately owning 50%) to: in one case, C.W. and Marguerite Jackson, as husband and wife and as residents of Arizona; in two cases to Columbus Air, an Arizona corporation whose sole shareholders are C.W. and Marguerite Jackson; and in the final case to Tiger Development, an Arizona partnership owned by C.W. and Marguerite Jackson, both as husband and wife, and as sole shareholders of Lincoln Meadows Corporation (now defunct).

23. Therefore, the two remaining conveyances were of stock of Indiana corporations, whose sole shareholders were C.W. and Marguerite L. Jackson, to an Arizona corporation, whose sole shareholders were the same C.W. and Marguerite L. Jackson.

24. Defendant C.W. Jackson has resisted Russell's allegations of fraudulent conveyances herein, by asserting, and presenting oral and documentary evidence at the June

24–26 hearing, that all the conveyances were ordinary business transactions reaping tax and management benefits for the Jacksons' businesses as a whole.

II. THE JACKSON PLASTICS TO C.W. AND MARGUERITE L. JACKSON TRANSFER

25. In November, 1980, Jackson Plastics purchased the real estate located at 2860 North National Road, Columbus, Bartholemew County, Indiana, from PPG Industries, Inc., which real estate was the Como plant. Jackson Plastics still owned the Como plant and real estate on September 24, 1984.

26. Jackson Plastics was an Indiana general partnership, whose sole general partners were C.W. Jackson and his wife, Marguerite, each separately owning 50% under Indiana law, an adoption of the Uniform Partnership Act.

27. On or about February 21, 1985, the Como plant located at 2860 North National Road, was deeded by Jackson Plastics Company to C.W. and Marguerite Jackson, husband and wife.

28. No, or inadequate, consideration was paid or received for the conveyance of the real estate located at 2860 North National Road.

29. C.W. Jackson and wife had beneficial interest and control over this real estate both before and after the attempted conveyance of that real estate.

III. THE JACKSON PLASTICS TO TIGER TRANSFER

30. On September 24, 1984, certain real estate located adjacent to 2860 North National Road, Columbus, Bartholemew County, Indiana, was owned by Jackson Plastics Company.

31. Jackson Plastics was an Indiana general partnership, whose sole general partners were C.W. Jackson and his wife, Marguerite, each separately owning 50% under Indiana law, an adoption of the Uniform Partnership Act.

32. On or about November 25, 1984, the real estate adjacent to 2860 North National Road was deeded by Jackson Plastics Company to Tiger Development Company.

33. No, or inadequate, consideration was paid or received for the conveyance of the real estate adjacent to 2860 North National Road.

34. C.W. Jackson and his wife are the owners of Tiger Development Company and had the beneficial interest and control over the real estate adjacent to 2860 North National Road both before and after the attempted conveyance.

35. Judgment defendant's separate interest in Jackson Plastics Company was subject to execution prior to the conveyance by Jackson Plastics Company. Judgment defendant contends that since the conveyances by Jackson Plastics Company, the property involved is not subject to execution.

IV. JACKSON PLASTICS TO COLUMBUS AIR TRANSFERS

36. On September 24, 1984, the aforementioned airplanes were owned by Jackson Plastics Company.

37. On or about November 27 and 28, 1984, these airplanes were transferred to Columbus Air Corporation, an Arizona corporation.

38. Jackson Plastics was an Indiana general partnership, whose general partners solely were C.W. Jackson and his wife, Marguerite, each separately owning 50% under Indiana law.

39. No, or inadequate, consideration was paid or received for the conveyance of these two airplanes.

40. Judgement defendant's interests in Jackson Plastics Company and its airplanes were subject to execution prior to the attempted conveyance. Judgment defendant contends that since the conveyances the property is not subject to execution.

V. THE COMO – EXCELARIUM MERGER

41. On May 16, 1983, at a board of directors meeting for Como, an Indiana corporation, the board of directors discussed a merger between Como and Excelarium, an Arizona corporation.

42. On March 11, 1985, the stockholders and board of directors of Excelarium and the stockholders and board of directors of Como, both of whose sole shareholders were C.W. and M.L. Jackson, met in meetings called for the purpose of merger, and, by resolution adopted by both corporations, agreed to merge Como into Excelarium and further agreed to a plan of merger.

43. On March 19, 1985, the Articles of Merger merging Como into Excelarium were filed with the Arizona Corporation Commission and accepted for filing by that commission.

44. In April 1985, after the acceptance of the plan by the Arizona Corporation Commission, Excelarium and Como tendered Articles of Merger to the Indiana Secretary of State.

45. The consideration received for the transfer of Como stock was additional stock in Excelarium Products Corp., of which C.W. Jackson and his wife already owned 100%.

46. C.W. Jackson and his wife had the beneficial interest and control over Como Plastics Corporation and Excelarium Products Corp., before and after the merger and transfer of stock.

47. However, judgment defendant's interest in the Como stock was not subject to execution prior to the conveyance. Under Arizona community property law, C.W. Jackson held the stock of Como jointly with his wife Marguerite, and as such the stock was not subject to execution for Russell's judgment against C.W. Jackson individually.

VI. THE LINCOLN MEADOWS – EXCELARIUM MERGER

48. On November 16, 1984, the shareholders and boards of directors of Excelarium and Lincoln Meadows, both of whose sole shareholders were C.W. and Marguerite Jackson, in meetings called for the purpose of merger, met and approved, by resolution, the merger of Lincoln Meadows into Excelarium. The boards of directors and officers of Excelarium and Lincoln Meadows then caused the Articles of Merger and the Plan of Merger to be executed and promptly filed.

49. The Articles of Merger merging Lincoln Meadows into Excelarium were recorded in the office of the Corporation Commission for the State of Arizona on November 29, 1984.

50. Excelarium and Lincoln Meadows promptly tendered Articles of Merger to the Secretary of State of Indiana.

51. The consideration received for the transfer of Lincoln Meadows stock was additional stock in Excelarium Products Corp., of which C.W. Jackson and his wife already owned 100%.

52. C.W. Jackson and his wife had the beneficial interest and control over Lincoln Meadows Corporation and Excelarium Products Corp., both before and after the merger and transfer of stock.

53. However, judgment defendant's interest in the Lincoln Meadows stock was not subject to execution prior to the conveyance. Under Arizona community property law, C.W. Jackson held the stock of Lincoln Meadows jointly with his wife Marguerite, and as such, the stock was not subject to execution for Russell's judgment against C.W. Jackson individually.

VII. PROPERTY SUBJECT TO EXECUTION

54. Jackson Plastics Company was an Indiana general partnership, and as such, the rights and obligations of the partnership and it's individual partners were governed by Indiana law, an adoption of the Uniform Partnership Act. Under Indiana law, C.W. and Marguerite Jackson were separate and distinct partners, each with a separate and distinct partnership interest in receiving income on a 50/50 basis from the partnership. That income to each, separately, would then become community property upon passing into the hands of the community. However, Indiana law provides that if a partner's individual right to the income is intercepted by a judgment creditor, or as I.C. 23-4-1-28 provides, by a receiver, then it does not move the next step into the hands of the community.

55. In the instant case, the Indiana partnership is now gone and any income from what was Jackson Plastics now flows to C.W. and Marguerite Jackson through three sources: Columbus Air, an Arizona corporation; Tiger, an Arizona partnership; and to them directly as husband and wife; in all events the income flows directly into the hands of the community of their marriage. However, if the four conveyances from Jackson Plastics were to be declared void as fraudulent conveyances, and if a charging order under I.C. 23-4-1-28 were to be entered against C.W. Jackson's

separate partnership income, then his separate partnership income would be intercepted and thereby not reach the hands of the community. Accordingly, C.W. Jackson's partnership interest and income would be subject to execution.

56. Como Plastics and Lincoln Meadows were Indiana corporations, and C.W. and Marguerite owned all the stock of those corporations jointly as husband and wife. The ownership of personal property is determined by the law of the state of domicile of the owners. Therefore, the Jacksons owned the stock of Como and Lincoln Meadows as community property, the law of their state of domicile, Arizona. Accordingly, the Jacksons' stocks are not subject to execution.

VIII. THE BADGES OF FRAUD

57. Since the Jacksons' ownership of stock in Como Plastics and Lincoln Meadows was not subject to execution in the first place, this Court need not, and will not, inquire further into the transfers of this stock to other entities.

58. At the hearing herein of June 24–26, 1987, Judgment Defendant Jackson was legally cloaked with a presumption of good faith in the transfers made by the Jackson Plastics partnership. Additionally, his attorneys presented exhaustive and credible evidence of tax benefits and management reorganization in an attempt to justify the transfers. This presumption and the business purposes notwithstanding, Jackson was or should have been aware of the suspicion that would cloud the transfers of all of his Indiana assets which were arguably subject to execution, into Arizona assets immune from execution on an Indiana judgment. In view of the valid judgment against him here in Indiana, Jackson's actions in transferring all Indiana assets to Arizona, even if arguably for valid business reasons, were at least shrouded with an appearance of impropriety, and at worst an inference, or direct evidence, of avoidance of the judgment. Because of this appearance, inference or direct evidence, the Court is compelled to weigh and balance

Defendant's presumption of good faith, the facts of the case and the "badges of fraud" set-out in Indiana law.

59. In all the questioned transactions by Jackson Plastics, no consideration, or no adequate consideration, was paid or received for the conveyances of the property or assets involved in the transfers.

60. These transactions by Jackson Plastics, which are the subject of these proceedings, all occurred within several months of the entry of judgment in this action.

61. These transactions greatly reduced and virtually eliminated the estate or property from which Plaintiff could execute on his judgment, while Jackson still retained the benefits and control over the property transferred.

62. The property was transferred between members of the same family for no, or inadequate, consideration received by the transferor.

63. The transactions occurred in a hurried fashion, without disclosure to Plaintiff, and were not done in the usual mode or course of doing business, Defendant's evidence to the contrary notwithstanding.

64. Other property, which was not used in these transactions and which was not subject to execution by Plaintiff as of September 24, 1984, was available to C.W. Jackson and Marguerite L. Jackson to use for tax and business planning purposes.

65. C.W. Jackson and Marguerite L. Jackson have used property which would have been available to satisfy Plaintiff's judgment, to substantially benefit themselves, through tax savings and other benefits, as a result of the transactions which are the subject of these proceedings.

66. The transfers of the real estate at 2860 North National Road, the adjacent real estate, and the airplanes

all were transfers from Indiana ownership to Arizona ownership.

67. After the transfers were completed on March 11, 1985, C.W. Jackson owned no property based in Indiana except for real estate owned with his wife as tenants by the entireties.

68. C.W. Jackson was either the actual or beneficial owner of all of the property which was transferred, and C.W. Jackson controlled and directed the transfer of all of the property.

69. The partnership assets transferred, because of Indiana law, were not community property under the law of Arizona prior to their transfer.

70. Any property currently held by C.W. Jackson and Marguerite L. Jackson that is not subject to execution by Plaintiff was acquired by C.W. and Marguerite for the benefit of the community property interests of C.W. and Marguerite as husband and wife.

71. The transactions of Jackson Plastics, which are the subject of these proceedings, were all consummated with the intent to frustrate and defraud the judgment creditor herein, the Plaintiff George E. Russell.

72. Sufficient badges of fraud are evident clearly and convincingly from the evidence in this matter, to the extent that this Court must find that the transfers from Jackson Plastics were fraudulent conveyances within the meaning of I.C. 32-2-1-14, as to Plaintiff herein, George E. Russell, a judgment creditor of Defendant herein, C.W. Jackson.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of George E. Russell and C.W. Jackson.

2. C.W. Jackson and Marguerite L. Jackson are husband and wife and have been married during all times pertinent to the matters raised by Plaintiff's Petition.

3. C.W. Jackson and Marguerite L. Jackson have resided and have been domiciled in the State of Arizona since 1969.

4. Indiana law provides that: "A partnership is an association of two or more persons to carry on as co-owners a business for profit." I.C. 23-4-1-6. The Jackson Plastics partnership, as constituted, appears to have been proper, consisting as it did of two separate persons.

5. The two separate persons requirement of Indiana law precluded an entity forming a partnership with itself. When Jackson and his wife elected to do business as a partnership, they expressly elected not to own their partnership interests in Jackson Plastics as community property. Since a partnership cannot consist of one entity, if C.W. and Marguerite Jackson were to have owned the partnership as a single community property, then there could not have been a valid partnership under Indiana law.

6. The Uniform Partnership Act expressly recognizes that ownership interests created by marriage do not establish a partnership, as I.C. 23-4-1-7 provides:

> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

Community property is clearly among those types of ownership contemplated by the above statute, and therefore it may not be used to establish a partnership.

7. C.W. Jackson and Marguerite L. Jackson could not be separate entities required to form a partnership, and then assert they were one entity of ownership in the hands of a community created by marriage. As to the partnership of Jackson Plastics, they had to be one or the other. They chose to be separate entities in order to form a legally valid partnership under Indiana law, at least for the purposes of the partnership.

8. Indiana partnership law, I.C. 23-4-1-1 et seq, determines the substantive rights of individual partners of Indiana partnerships.

9. The fraudulent conveyances statute, I.C. 32-2-1-14, is intended to cover all conveyances made to defraud creditors, regardless of the actual transferor of the property or asset.

10. A conflict of laws analysis leads to the conclusion that Indiana collection law prevails over Arizona community property law when the interest and income of separate partners of Indiana partnerships does not reach the hands of the community of marriage.

11. However, a conflict of laws analysis leads to the conclusion that Arizona community property law prevails over Indiana collection law where husband and wife jointly own personal property such as the shares of stock in question in this case.

12. Under Indiana law, the character of joint personal property owned by spouses is to be determined by the law of the state of matrimonial domicile. In this case, because the Jacksons are domiciled in Arizona, the character and ownership of their joint personal property is determined by the law of the State of Arizona.

13. Arizona law provides that all personal property acquired by the spouses during marriage, and while domiciled in Arizona, is presumed to be property owned by the marital community; however, Indiana's law as to determination of partnership interests prevails.

14. Arizona law provides that community property is not liable for the separate debts or judgments of either spouse.

15. At all times material hereto, the corporate shares of Excelarium, Como, Columbus Air and Lincoln Meadows, were personal property owned by the Jackson marital community.

16. The judgment which Russell has against C.W. Jackson is not enforceable against the Jackson marital community, including the shares they held of Como and Lincoln Meadows.

17. Russell does not have a judgment lien upon the Jacksons' ownership interests in Excelarium, Columbus Air, Tiger, Como or Lincoln Meadows.

18. Russell does not have a judgment against Excelarium, Columbus Air, Tiger, Como or Lincoln Meadows.

19. Russell has not obtained a lien on Jackson's shares of stock in Como, Lincoln Meadows or Excelarium.

20. Because Russell does not have a lien on any of the shares of stock of Como, Lincoln Meadows or Excelarium, he does not have the standing to challenge the mergers and agreements entered into by those corporations.

21. However, the partnership interests of C.W. Jackson in Jackson Plastics was a separate and distinct individual interest, and thereby subject to execution for the judgment held by George E. Russell in this matter. Russell,

therefore, has standing to challenge the transfers made by Jackson Plastics to other out-of-state entities.

22. A finding of fraudulent conveyance would be proper under the evidence presented in these proceedings if only a few of the badges of fraud had been present, but the overwhelming nature of the evidence presented in these proceedings demonstrates that virtually all of the badges of fraud are present, and further leads but to one, inescapable conclusion, that the transfers made by Jackson Plastics must be set aside as being transacted for the purpose of avoiding payment of Plaintiff's judgment, at least to the extent of the interest of C.W. Jackson in Jackson Plastics partnership.

ORDER

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND DECREED as follows:

1. Plaintiff's Petition is DENIED as to the transfers by way of merger of stock from Como Plastics and Lincoln Meadows corporations to Excelarium Corporation.

2. Plaintiff's Petition is GRANTED as to the transfers from Jackson Plastics Company partnership to other entities, as alleged in the Petition.

3. The conveyance of real estate located at 2860 North National Road, Columbus, Bartholemew County, Indiana, commonly known as the Como Plastics plant, on or about March 25, 1985, from Jackson Plastics, an Indiana general partnership, to C.W. and Marguerite L. Jackson, husband and wife, is hereby DECLARED VOID as to Plaintiff George E. Russell pursuant to I.C. 32-2-1-14. Plaintiff is entitled to levy upon and seek execution against such property as permitted by law as though the attempted conveyance on or about March 25, 1985, had never occurred.

4. The conveyance of real estate adjacent to 2860 North National Road, Columbus, Bartholemew County, Indiana, from Jackson Plastics Company, an Indiana general partnership, to Tiger Development Company, on or about November 25, 1984, is hereby DECLARED VOID as to Plaintiff George E. Russell pursuant to I.C. 32-2-1-14. Plaintiff is entitled to levy upon and seek execution against such property as permitted by law as though the attempted conveyance on or about November 25, 1984, had never occurred.

5. The attempted transfers of the Beechcraft King Air 90 airplane and the Beechcraft Baron airplane by Jackson Plastics Company, on November 27 and 28, 1984, after judgment was entered in this case, to Columbus Air, an Arizona corporation, are hereby DECLARED VOID as to Plaintiff George E. Russell pursuant to I.C. 32-2-1-14. Plaintiff is entitled to levy upon and seek execution against such property as permitted by law as though the attempted conveyances on November 27 and 28, 1984, had never occurred.

6. Counsel for Plaintiff is directed to forthwith prepare a "Charging Order" pursuant to I.C. 23-4-1-28, for signature and entry by this Court along with this Order.

7. C.W. Jackson has a legal obligation to pay Plaintiff's judgment, including interest and costs, and therefore C.W. Jackson is hereby ORDERED to pay the judgment, including all interest and costs, immediately, to the extent of his interest in Jackson Plastics Company.

8. The costs of these proceedings on the Petition of Plaintiff are hereby assessed against the Defendant, C.W. Jackson.

9. The Clerk of this Court is hereby ORDERED to certify a copy of these Findings of Fact, Conclusions of Law and Order, and transmit same immediately to the Court of Appeals of Indiana, pursuant to its previous Order.

Dated: October 14, 1987

/s/ Ronald E. Drury
JUDGE, Boone Circuit Court

Copies to counsel:

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Peter L. Obremskey
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and
Clerk of the Court of Appeals of Indiana
under Cause No. 06A01-8606-CV-00151

APPENDIX E

BOONE CIRCUIT COURT

BOONE COUNTY, INDIANA

CHARGING ORDER

October 26, 1987

IN THE BOONE CIRCUIT COURT OF INDIANA

GEORGE E. RUSSELL,	)	
	)	
Plaintiff,	)	CAUSE NO.
	)	C82-228
vs.	)	
	)	
C.W. JACKSON,	)	
	)	
Defendant.	)	
	)	
	)	
C.W. JACKSON,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
PPG INDUSTRIES, INC.,	)	
	)	
Third-Party Defendant.	)	
	)	
	)	

GEORGE E. RUSSELL,

Plaintiff, Judgment Creditor,

vs.

JACKSON PLASTICS COMPANY; EXCELARIUM PRODUCTS CORPORATION; COLUMBUS AIR CORPORATION; TIGER DEVELOPMENT COMPANY; MARGUERITE L. JACKSON; and G.L. INDUSTRIES, INC.,

Garnishee-Defendants.

CHARGING ORDER

Plaintiff George E. Russell obtained a judgment against defendant C. W. Jackson in this Court on September 24, 1984 in the amount of $2,000,000, plus costs and interest from the date of judgment. That judgment remains unsatisfied as of the date of this Order. C. W. Jackson is a partner in Jackson Plastics Company, an Indiana general partnership, which partnership attempted to transfer its ownership of real and personal property post-judgment. These attempted transfers by Jackson Plastics have been set aside and declared void as to plaintiff Russell pursuant to I.C. § 32-2-1-14 by order of this Court dated October 14, 1987. Plaintiff Russell is therefore entitled to a charging order in accordance with I.C. § 23-4-1-28, charging the interest of the debtor partner C. W. Jackson with payment of the unsatisfied amount of the judgment debt with interest thereon.

It is therefore ORDERED, ADJUDGED AND DECREED:

1. The fifty percent (50%) partnership interest held by judgment-defendant C. W. Jackson in Jackson Plastics Company is hereby charged with payment of the unsatisfied amount of the judgment debt owed by C. W. Jackson to George E. Russell, in the amount of $2,000,000, along with costs of that action as well as interest in the amount of twelve percent (12%) per annum from the date of judgment, September 24, 1984.

2. George E. Russell shall be entitled to receive the share of the profits of Jackson Plastics Company, as well as any other money due or to fall due to C. W. Jackson, because of C. W. Jackson's partnership interest in Jackson Plastics Company.

3. Jackson Plastics Company is to provide to this Court and counsel for George E. Russell a monthly accounting of its income and expenses, including the amounts paid to George E. Russell as a result of this charging order and the amounts paid to the other partner of Jackson Plastics Company.

4. Jackson Plastics Company is to pay to plaintiff George E. Russell all income, profits, funds, rents, distributions, proceeds and funds of any kind to which C. W. Jackson is entitled because of his 50% interest in Jackson Plastics Company.

5. Defendant C. W. Jackson and garnishee-defendant Jackson Plastics Company are ordered to notify in writing this Court and counsel for George E. Russell of the intention to sell any real estate or personal property owned by Jackson Plastics Company, at least 30 days prior to the sale of such property. Such notice shall include the name and address of the buyer and the proposed amount and date of sale. In the event of such sale, Jackson Plastics Company is to provide to this Court and counsel for George E. Russell, at least ten (10) days before the contemplated sale, an accounting of the expected proceeds and expenses of sale, including the amounts to be paid to George E. Russell as a

result of this charging order and the amounts to be paid to the other partner of Jackson Plastics Company.

6. In the event of the sale of any real or personal property of Jackson Plastics Company, C. W. Jackson's interest in the proceeds and profits from that sale are to be paid to plaintiff George E. Russell in satisfaction of his judgment against defendant C. W. Jackson.

7. Inasmuch as this Court has declared void the conveyance by Jackson Plastics Company to C. W. Jackson and Marguerite L. Jackson on February 21, 1985, of real estate located at 2860 North National Road, this Court's Order of March 12, 1986 applying to that property is superseded by this Order and is hereby rescinded.

DATED: 10/26, 1987.

/s/ Ronald E. Drury
JUDGE, Boone Circuit Court

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Supreme Court, U.S.
FILED
JAN 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-997

In The

Supreme Court of the United States

October Term, 1989

MARGUERITE L. JACKSON, ET AL.,

Petitioners,

v.

GEORGE E. RUSSELL,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a reviewable federal question is raised under the full faith and credit clause of the United States Constitution where the forum state does not deny the validity of the laws of a sister state but merely construes the sister state's laws to have no application to the case.

2. Whether Indiana has sufficient forum contacts with the parties and the occurrence giving rise to the litigation to justify application of its laws.

3. Whether a substantial federal question has been raised.

LIST OF PARTIES

The Respondent, George E. Russell ("Russell") is a judgment creditor of Petitioner C.W. Jackson ("Jackson"). On September 24, 1984, the Boone Circuit Court of Indiana entered judgment on behalf of Russell and against Jackson in the amount of $2,000,000 plus interest and costs. The remaining Petitioners, Jackson Plastics Company, Excelarium Products Corporation, Columbus Air Corporation, Tiger Development Company, and Marguerite L. Jackson ("Mrs. Jackson"), are garnishee defendants who were added to the case following hearings on proceedings supplemental to execution on the judgment.

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No. 89-997

In The

Supreme Court of the United States

October Term, 1989

MARGUERITE L. JACKSON, ET AL.,

Petitioners,

v.

GEORGE E. RUSSELL,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, George E. Russell, respectfully prays that Petitioners' Petition for Writ of Certiorari be denied.

OPINIONS BELOW

This case originates from a judgment entered in late 1984. On September 24, 1984, judgment was entered by the Boone Circuit Court of Indiana on behalf of Russell and against Jackson in the amount of $2,000,000 plus costs and interest. The judgment was entered following a

four-week trial in which a jury concluded that Jackson had tortiously interfered with a contract, committed constructive fraud, breached his fiduciary duty to a joint venturer, and violated the Indiana Criminal Mischief Statute, Ind. Code § 35-43-1-2. Jackson appealed and the judgment was affirmed by *Jackson v. Russell*, 498 N.E.2d 22 (Ind. App. 1986). Jackson's Petition for Rehearing in the Court of Appeals and Petition for Transfer to the Indiana Supreme Court were denied. This matter stems from the attempted execution and satisfaction of this judgment.

Through hearings on proceedings supplemental to execution on the judgment and discovery, Russell learned of several post-judgment transfers by Jackson of his property situated in Indiana. Russell filed a Petition for Finding of Fraudulent Conveyances pursuant to Ind. Code § 32-2-1-14, in order to set these transfers aside and make the involved assets available to satisfy the judgment. The garnishee defendants, Jackson Plastics Company, an Indiana general partnership, Excelarium Products Corporation, an Arizona corporation, Columbus Air Corporation, an Arizona corporation, Tiger Development Company, an Arizona general partnership, and Marguerite L. Jackson, were added to the case. Trial of the fraudulent conveyance petitions was conducted to the Boone Circuit Court on June 24-26, 1987. On October 14, 1987, the trial court entered its Findings of Fact, Conclusions of Law and Order (see Appendix "D" to Petition for Writ of Certiorari). On October 26, 1987, the trial court issued a charging order in regard to execution against Jackson's property which the trial court found was fraudulently conveyed. Jackson appealed this order and Russell filed a cross-appeal.

The Court of Appeals of Indiana issued its decision on January 17, 1989. The decision affirmed the rulings of the trial court with regard to Jackson's interest in Jackson Plastics Company, an Indiana partnership, concluding that it was subject to execution before the judgment and was fraudulently conveyed after the judgment. The Court of Appeals reversed the trial court in regard to the finding that Jackson's stock in Como Plastics Corporation, an Indiana corporation, was not subject to execution before it was conveyed.

JURISDICTION

Petitioners have sought to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioners contend that the Indiana Court of Appeals has passed upon a right "specifically set up or claimed under the Constitution." This Court lacks jurisdiction to review this matter. The Indiana Court of Appeals did not consider or decide a federal question. The Court of Appeals of Indiana considered Arizona law and determined that it did not apply in this situation. It concluded that there was no conflict of laws, no denial of full faith and credit, and no denial of due process.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners contend that Indiana has denied full faith and credit to the rights of Marguerite L. Jackson as established under Arizona law and that her rights to due process and equal protection of the law as guaranteed by

the fourteenth amendment of the United States Constitution have been violated. As will be demonstrated, Indiana did not deny full faith and credit to the laws of Arizona and did not deny due process to Mrs. Jackson.

STATEMENT OF THE CASE

Petitioners seek to portray this matter as one where Russell and the Indiana Court of Appeals are villians and Mrs. Jackson is the innocent victim. It is not disputed that Mrs. Jackson was not a party to the $2,000,000 judgment rendered against her husband. However, in the last five and a half years, Mrs. Jackson has joined her husband in a systematic scheme to render Jackson judgment-proof, by converting Indiana assets subject to execution into Arizona community property in an effort to prevent Russell from collecting a valid Indiana judgment, a judgment which was rendered because of Jackson's tortious and fraudulent conduct.

When judgment was entered on September 24, 1984, C.W. Jackson had been a resident of Arizona since 1969 and had been married to Marguerite L. Jackson for more than 40 years. He owned all of the stock of Como Plastics Corporation, an Indiana corporation created in 1980. Como Plastics operated a manufacturing plant out of a building which was owned by Jackson Plastics Company, an Indiana general partnership. The Jacksons were the only partners of Jackson Plastics, each owning 50%. Jackson Plastics was created in 1980 for the purpose of owning Como real estate and leasing it to Como Plastics Corporation. It was the Jacksons' usual practice to own

their real estate either in partnership or personally, for tax reasons.

At the time judgment was entered, Jackson Plastics also owned a parcel of land adjacent to the Como plant and two airplanes. Jackson Plastics operated without any change in its ownership through 1984.

Beginning two months after judgment was entered, Jackson Plastics began to transfer all of its property to the Jacksons or other entities owned and controlled by them. On November 27, 1984, Jackson Plastics transferred one of its airplanes, a Beechcraft King Air 90, to Columbus Air Corporation. All of the stock of Columbus Air Corporation was owned by the Jacksons.

Despite the fact that its only assets were located in Indiana, Columbus Air was incorporated in Arizona. The Articles of Incorporation of Columbus Air were filed in Arizona on December 13, 1984. No money whatsoever was paid by Columbus Air as consideration for the transfer of the airplane. The airplane was transferred through a bill of sale signed by the Jacksons as general partners of Jackson Plastics. This airplane had been acquired by Jackson Plastics about two months earlier.

On November 28, 1984, Jackson Plastics transferred its second airplane, a Beechcraft Baron, to Columbus Air. Again, Columbus Air paid nothing as consideration for this transfer.

Also on November 28, 1984, Jackson Plastics transferred to Tiger Development Company, an Arizona partnership, the land adjacent to the Como Plastics plant.

This land was transferred by quitclaim deed. The Jacksons owned 100% of Tiger Development Company, since half of it was owned by them as individuals and the other half was owned by Lincoln Meadows Corporation, an Indiana corporation, in which the Jacksons owned all of the stock. Tiger Development paid nothing to Jackson Plastics in consideration for the transfer of this property.

After these transfers, one asset, the Como plant and real estate, remained in Jackson Plastics. This asset was transferred to the Jacksons as "husband and wife as their community property", on February 21, 1985. This transfer was made by quitclaim deed signed by C.W. Jackson as general partner of Jackson Plastics. Even though there was a minimum of several hundred thousand dollars of equity in the property, Jackson Plastics received no money for this transfer, except for the $10 stated as consideration in the deed. There was no change in the mortgage or loan documents as a result of this transfer.

After this transfer, Jackson Plastics had no assets. All of the assets of Jackson Plastics were conveyed in a three-month period either to Arizona entities owned entirely by the Jacksons or, in the case of the Como real estate, to the Jacksons personally "as their community property."

On March 11, 1985, Como Plastics was merged with Excelarium Products Corporation, an Arizona corporation, and Como Plastics was dissolved. The Jacksons owned all of the stock of Excelarium before and after the merger. No money changed hands as a result of the merger. The Jacksons simply received more stock in Excelarium. At the time of the merger, Como Plastics' stock transfer ledger and the Jacksons' stock certificates

indicated that the Jacksons owned Como's stock as joint tenants with rights of survivorship.

With the merger of Como into Excelarium, Jackson no longer owned any interest in Indiana partnerships or corporations, having transferred assets and ownership of Indiana entities to Arizona entities owned by him and his wife, except for a few parcels of Indiana real estate owned in tenancy by the entirety with his wife. Jackson contends that all property owned outside of Indiana is Arizona community property not subject to execution, including property once owned by Jackson Plastics and transferred after September 24, 1984. Jackson contends that he has no property available against which Russell can execute. Jackson has not paid the judgment because he contends he is not legally obligated to do so.

On June 27, 1986, and December 29, 1986, Russell filed a Petition for Finding of Fraudulent Conveyances and a supplement thereto, challenging these post-judgment transfers. A trial on the petitions was held in June, 1987, and the trial court issued its Findings of Fact, Conclusions of Law and Order on October 14, 1987. The decision of the Indiana Court of Appeals issued January 17, 1989, affirmed the findings of the trial court with regard to Jackson's interest in Jackson Plastics Company. The Court of Appeals agreed that Jackson's partnership interest was subject to execution and was fraudulently conveyed after the judgment. The Court of Appeals reversed the trial court in regard to the finding that Jackson's stock in Como Plastics Corporation, an Indiana corporation, was not subject to execution before it was conveyed and remanded to the trial court for proceedings consistent with the Court of Appeals' opinion. After the

Court of Appeals denied petitioners' Petition for Rehearing and the Indiana Supreme Court denied their Petition for Transfer, this Petition for Writ of Certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Indiana Court of Appeals did not decide a federal question.

Petitioners contend that certiorari jurisdiction in this case derives from 28 U.S.C. § 1257(a), which provides in part that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution . . . ." The thrust of Petitioners' argument is that the January 17, 1989, decision of the Indiana Court of Appeals violates the due process rights of Mrs. Jackson and fails to give full faith and credit to the community property laws of Arizona.

Jurisdiction under 28 U.S.C. § 1257 does not exist if two requirements – that a federal question be raised and that it be decided in the state court below – do not appear on the record. *Illinois v. Gates*, 462 U.S. 213, 217-218 (1983). As stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), the rationale for the Court's inability to review state court judgments when no federal question has been decided:

> is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial

> systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

The opinion of the Court of Appeals does not decide a federal question. Petitioners' due process and full faith and credit arguments rest on an incorrect assumption. Petitioners assume that the Indiana Court of Appeals' decision strips Mrs. Jackson of her property without due process of law, because it results in execution against community property, which the Jacksons argue is indivisibly owned by them. The incorrect assumption is that the decision allows execution against community property. It does not.

The Court of Appeals first determined whether the post-judgment transfers of the property by the Jacksons were fraudulent. The Court of Appeals determined that based upon the specific facts of this case, those transfers were fraudulent.

> An examination of the post-judgment Jackson transfers, as previously recounted in this opinion, shows that they comfortably fit within the *Arnold* [*Arnold v. Dirrim*, 398 N.E.2d 442, 446 (Ind.App. 1979)] indicia of fraud. Even though Jackson sets forth legitimate business purposes for each of the transactions, a pure motive on the part of the debtor in making a fraudulent transfer will not cleanse the transaction. *Gable v.*

> *Columbus Cigar Company* (1895), 140 Ind. 563, 38 N.E. 474.

Jackson v. Russell, 533 N.E.2d 153, 155 (Ind.App. 1989); Appendix to Petition for Writ of Certiorari, p. A-6.

The Court of Appeals was not concerned with how the property was owned subsequent to the transfers; only with how the property was owned prior to transfer. The trial court specifically determined, at least as to the interest in Jackson Plastics, that the Jacksons had elected to do business as partners and had expressly elected not to own their partnership interest as community property. As stated by the trial court:

> When Jackson and his wife elected to do business as a partnership, they expressly elected not to own their partnership interests in Jackson Plastics as community property.

(Trial court's Conclusions of Law, ¶ 5, Appendix to Petition p. A-27.) The trial court's opinion with regard to the Jackson's interest in the Jackson Plastics partnership was affirmed in all respects by the Court of Appeals.

The Court of Appeals reversed the trial court's decision as it related to the Como Plastics stock and remanded it for further proceedings. The Court of Appeals specifically determined that the original stock in Como Plastics was held by Jackson and his wife as joint tenants with rights of survivorship and not as community property. The Court of Appeals stated:

> The original stock in Como Plastics was held by Jackson and his wife as joint tenants with rights of survivorship as indicated by the stock certificates and the stock transfer ledger of the corporation.

Jackson v. Russell, 533 N.E.2d at 156; Appendix to Petition, p. A-8. By choosing to hold stock in Como Plastics as joint tenants, the Jacksons specifically elected not to hold the property as community property.

Under Arizona law, all property acquired by either or both of the spouses during coverture is presumed to be community property. *King v. Uhlmann*, 437 P.2d 928, 943 (Ariz. 1968). Despite this presumption, Arizona recognizes the right of a husband and wife to hold property as joint tenants in derogation of their community property status, provided it clearly appears that the spouses agree the property should be taken in that manner. *National Industries, Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258 (9th Cir. 1982). In this case, the Indiana courts determined that it was the intent of the Jacksons not to hold either the partnership property or the stock as community property. This is not a denial of full faith and credit or of due process. It is merely a determination of the Jacksons' intent which was consistent with Arizona law. This Court may not review state court findings of fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925).

To constitute a violation of the full faith and credit clause or the due process clause, it is not enough that a state court misconstrue the law of another state. *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Company*, 243 U.S. 93, 96 (1917). The full faith and credit clause requires only that states accord full faith and credit to other states' laws; that is, that states acknowledge the validity and finality of such laws and attempt in good faith to apply them when necessary as they would be applied by home

state courts. *Guaranty Trust Company v. New York*, 326 U.S. 99, 109 (1945). As Justice Holmes has explained, when "[t]here is nothing to suggest that [one's state court] was not candidly construing [another state's law] to the best of its ability, and even if it was wrong, something more than an error of construction is necessary" to invoke the jurisdiction of this Court pursuant to the full faith and credit clause of the Constitution. *Pennsylvania Fire Insurance Company v. Gold Issue Mining and Milling Company*, 243 U.S. 93, 96 (1917). See also *Western Life Indemnity Co. of Illinois v. Rupp*, 235 U.S. 261, 275 (1914); *Louisville and N. R. Co. v. Melton*, 218 U.S. 36, 50-51 (1910).

In this case, the Indiana courts examined the intent of the Jacksons and the laws of Arizona and correctly determined that the Jacksons' interest in Jackson Plastics was not community property and that the original stock in Como Plastics was held by Jackson and his wife as joint tenants and not as community property. Even if this decision is incorrect, it does not invoke the jurisdiction of this Court pursuant to the full faith and credit clause of the United States Constitution. *Pennsylvania Fire Ins. Co. v. Gold Issue Min. and Mill. Co.*, 243 U.S. 93, 96. Something more than a mere error of construction is necessary to invoke the jurisdiction of this Court.

Nor does the Court of Appeals' opinion violate Mrs. Jackson's right to due process of law. Since the Jacksons did not hold these interests as community property, the judgment of the Indiana Court of Appeals affected only Mr. Jackson's interest. It did not affect Mrs. Jackson's rights. As stated by the Court of Appeals:

> It also follows that our decision does not effect [sic] the property of Marguerite L. Jackson

> thereby rendering Jackson's third issue relating to due process moot.

Jackson v. Russell, 533 N.E.2d at 156; Appendix to Petition, p. A-8.

There is simply no federal question presented. The Indiana courts have examined the law of both states and concluded that under the facts, the property in question was not community property which was entitled to protection from judgment creditors. What petitioners try to characterize as a federal question is nothing more than an invitation to reconsider the evidence. This Court should decline that invitation.

2. Indiana has sufficient forum contacts with the parties and the occurrence giving rise to the litigation to justify application of Indiana law.

Russell believes that the Indiana courts did not deny full faith and credit to the laws of Arizona because the courts considered Arizona law and concluded the protections of community property did not attach to the partnership and stock interests. The Indiana Court of Appeals simply held that this particular property was not intended by the Jacksons to be held as community property. Nowhere in the Court of Appeals' opinion is it asserted or implied that Indiana would not give full force and effect to Arizona community property law if the Jacksons had intended to hold their personal property interests as community property. Nonetheless, for purposes of this argument section, Russell will assume that the Jacksons intended to hold the property as community property, but that Indiana chose to apply its law rather

than Arizona law. Even with this assumption, the treatment of the Jacksons by the Indiana courts was constitutionally sound.

Throughout their Petition, Petitioners claim that if they held their personal property as community property prior to its fraudulent transfer, then Indiana was required to give full faith and credit to Arizona law. This is incorrect. The full faith and credit clause does require each state to give effect to official acts of other states. A judgment entered in one state must be respected in another provided that the first state had jurisdiction over the parties and the subject matter. Moreover, in certain limited situations, the courts of one state must apply the statutory law of another state. *Nevada v. Hall*, 440 U.S. 410, 421 (1979); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932).

However, the full faith and credit clause does not require a state to apply another state's law in violation of its own legitimate public policy. *Nevada v. Hall*, 440 U.S. at 422; *Pacific Employers Ins. Co. v. Industrial Accident Comm'n of State of California*, 306 U.S. 493 (1939). On the contrary, in view of the fact that the forum state is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests. *Allstate Insurance Company v. Hague*, 449 U.S. 302, 323 (1981), Justice Stewart concurring. Otherwise, a rigid and literal enforcement of the clause without regard to the statutes of the forum would lead to the absurd result that wherever a conflict arises, the statute of each state must be enforced in the courts of another, but cannot be enforced in its own courts. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547 (1935). As stated by the Court in *Pacific Insurance Co.*:

> . . . we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events. . . .

Pacific Insurance Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502-503.

A particular set of facts giving rise to litigation can justify, constitutionally, the application of more than one jurisdiction's laws. The due process clause and the full faith and credit clause thus provide modest restrictions on the application of forum law. These restrictions require that for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

The choice of Indiana law was constitutional. Indiana had significant contacts with the parties and the occurrence giving rise to the litigation such that the choice of its law is neither arbitrary nor fundamentally unfair. Russell is a resident of Indiana; this case concerns the enforcement of an Indiana judgment; the property fraudulently conveyed was real estate owned by an Indiana partnership and stock in an Indiana corporation; and the wrongful acts giving rise to the original judgment were committed solely in Indiana in order to take ownership of Indiana real estate and an Indiana corporation. See *Jackson v. Russell*, 498 N.E.2d 22, 25.

Moreover, Jackson was a partner in an Indiana partnership and an owner of stock in an Indiana corporation. The Indiana Court of Appeals found this to be significant. It stated:

> Jackson's arguments about community property notwithstanding, the overriding facts are that Jackson is a partner in an Indiana partnership whose assets are located in Indiana.

Jackson v. Russell, 533 N.E.2d at 156; Appendix to Petition, p. A-7.

> Under the facts of this case, we are dealing with shares of stock in an Indiana corporation whose assets are located entirely in Indiana and which are owned by joint tenants.

Jackson v. Russell, 533 N.E.2d at 157; Appendix to Petition, p. A-9.

Indiana has a substantial interest in enforcing valid judgments rendered by its courts; in protecting its citizens from fraudulent acts which occur within its jurisdictional limits; and in the satisfaction of its judgments through the execution and attachment of property within its borders. In this case, Indiana had a significant aggregation of contacts with the parties and the occurrence which created state interests, such that the application of Indiana law was neither arbitrary nor fundamentally unfair. Accordingly, the choice of Indiana law by the Indiana Court of Appeals did not violate the due process clause or the full faith and credit clause. See *Allstate Insurance Company v. Hague*, 449 U.S. at 313; *Nevada v. Hall*, 440 U.S. 410; *Carroll v. Lanza*, 394 U.S. 408 (1955); *Watson v. Employer's Liability Assurance Corp.*, 348 U.S. 66

(1954); *Pacific Employer's Ins. Co. v. Industrial Accident Comm'n.*, 306 U.S. 493.

In an attempt to avoid traditional due process and full faith and credit analysis, the Jacksons have asked the Court to apply a more exacting standard. Although at one time a more exacting standard was required under the full faith and credit clause than under the due process clause for evaluating the constitutionality of choice of law decisions, this Court has since abandoned the weighing of interests requirement. *Carroll v. Lanza*, 349 U.S. 408; *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10. Since *Carroll v. Lanza* was decided, the Supreme Court has recognized that both the due process and the full faith and credit clauses are satisfied if the forum has such significant contacts with the litigation that it has a legitimate state interest in applying its own law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 333. There is no precedent or reason to support a different standard in this situation. Jackson's argument that a more rigid standard should be followed under full faith and credit clause analysis should be rejected.

Petitioners have attempted to portray this case as something other than a case involving the selection of one state's substantive law over another, again in an effort to steer this Court from traditional due process and full faith and credit analyses. Petitioners claim that this case is one which involves the recognition of personal property rights established under the law of one state. They assert that in such a case, the forum state has no choice but to recognize those personal property rights, citing *Clark v. Williard*, 292 U.S. 112 (1934). This proposition cannot be found anywhere in that case.

The dispute in *Clark v. Williard* did not revolve around what title the liquidator in that case had, but rather how that title was acquired. Montana believed whatever title the Iowa liquidator had was derived from the judgment of an Iowa court, not an Iowa statute. Under Montana law, title (whatever it is) traced to a judgment is subject to attachment and execution. The Court stated:

> The Supreme Court of Montana has held that his title to the assets, if he has any, is derived, not from any statute, but from an involuntary assignment under a judgment of a foreign court. A title traced to such a source is subject in Montana to attachment and execution at the suit of local creditors. The question has been left unanswered whether attachments and executions are enforceable to the same extent in derogation of the title of a statutory successor.

292 U.S. 112, 114.

The first *Clark v. Williard* decision merely held that the Supreme Court of Montana had misinterpreted the Iowa court's judgment and Iowa statutes in holding that title to the assets was derived not from any statute but from a judgment of the Iowa courts. Accordingly, the decision was remanded to the Montana Supreme Court to determine whether the decision would be the same, that is, whether attachments and executions are enforceable to the same extent against a statutory successor as they would be against a successor who had acquired his title from a foreign judgment.

After remand, the Montana Supreme Court decided that its state laws permitted attachment and execution of a corporation's assets and that this rule prevailed against a statutory successor just as it did against a chancery

receiver. As stated by the Supreme Court in *Clark v. Williard*, 294 U.S. 211 (1935):

> The Supreme Court of Montana has reconsidered the conflicting claims of liquidator and creditors in the light of that decision. [*Clark v. Williard*, I] It has held (the Chief Justice and an associate justice dissenting) that the local policy of the state permits attachments and executions against insolvent corporations, foreign and domestic; that the writs will not be halted though the effect of the levy may be waste or inequality; and that this rule will prevail against a statutory successor, clothed with title to the assets, just as much as against the corporation itself or the trustees upon dissolution or a chancery receiver.

294 U.S. at 213.

The Supreme Court in *Clark v. Williard* II goes on to explain that every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts. 294 U.S. 211, 213. Petitioners dismiss this statement as dicta. However, Petitioners do not deny that the Supreme Court determined that the decision of the State of Montana to permit execution against the insolvent corporation was constitutional.

Petitioners fail to note that *Clark v. Williard* II relied upon a previous Supreme Court decision, *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664 (1877), which states:

> . . . the liability of property to be sold under legal process, issuing from the court of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on

> the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides.

93 U.S. 1003, 1004.

Not only is there no precedent to support Petitioners' proposition that a forum court must give recognition under the full faith and credit clause to property rights established under the law of a sister state, but such a proposition would conflict with *Clark v. Williard II* and *Hervey v. Rhode Island Locomotive Works*. By transferring and holding property in Indiana, Petitioners have impliedly submitted to Indiana law with regard to property ownership and its liability. 93 U.S. at 1004; *Clark v. Williard*, 294 U.S. 211, 213. Petitioners' proposition would also lead to the absurd result that no matter what the situation, where a conflict arises, a forum court could never apply its own law. *Alaska Packers*, 294 U.S. at 547.

Petitioners argue in sections C and D of their Petition that there is no conflict between Arizona community property law and Indiana law. This argument is somewhat contrived. Since, for purposes of this argument section, it is assumed that the property held by Petitioners prior to its fraudulent transfer was community property and consequently not subject to execution, there is certainly a conflict in the substantive law of Arizona and Indiana, since Indiana determined that the property *was* subject to execution. Nonetheless, these arguments really raise nothing for this Court to review since the Indiana Court of Appeals chose to apply Indiana law and

determined that the property held by Petitioners was subject to execution.[1] Thus, the only question before this Court is whether that choice was constitutional. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306 n.6. As demonstrated above, that choice was constitutional.

3. Petitioners have not raised a substantial federal question.

The issues raised by Petitioners do not merit the review of this Court. The issues have been recently discussed and sufficiently addressed in the recent cases of *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981). These cases have determined that the minimum requirements imposed by the full faith and credit clause are, in a context such as this, the same as those imposed by the due process clause. *Sun Oil Co. v. Wortman*, 486 U.S. 717, n.3; *Allstate Insurance Company v. Hague*, 449 U.S. 302, 308 n.10. These cases have pronounced a consistent standard of review. A forum state should not apply its law unless it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips*

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[1] Again, for purposes of this argument, it is assumed that the Indiana Court of Appeals recognized a conflict between Arizona and Indiana law, but chose to apply Indiana law. As argued in the preceding section, Russell believes the Indiana Court of Appeals did not afford the Jacksons the protection of Arizona community property law because the Jacksons did not intend to hold these particular assets as community property even under Arizona law.

Petroleum, supra, 472 U.S. at 818, *quoting Allstate Insurance Company v. Hague,* 449 U.S. at 312-313.

The judgment of the Indiana Court of Appeals is not as far reaching as Petitioners suggest; rather, it is extremely narrow. The Indiana Court of Appeals' decision is limited to its very specific facts. This situation will only arise again where a resident of a community property state commits acts in a sister state which result in judgment against him and where the community property resident attempts to shield property located in the forum state from execution by relying on the community property laws of his state of residence. The Court of Appeals of Indiana correctly determined that Indiana law should apply to these facts. Petitioners have not raised a substantial federal question which would merit the review of this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 89-997

In The

Supreme Court of the United States

October Term, 1989

MARGUERITE L. JACKSON, ET AL.,

Petitioners,

v.

GEORGE E. RUSSELL,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

Petitioners hereby file their Reply in Support of their request that a Writ of Certiorari issue to review the judgment and Opinion of the Court of Appeals of Indiana entered in the above-entitled proceeding on January 17, 1989.

I. INTRODUCTION.

The present case presents an excellent opportunity for this Court to address an important and far-reaching issue of constitutional law, namely, the proper scope of the full faith and credit clause of the Constitution as applied to a forum's refusal to recognize community property rights established in a sister state. To discourage the granting of certiorari to determine this issue, Russell tries to create three false illusions.

1. The first illusion is that petitioner Marguerite L. Jackson ("Marguerite"), who Russell intentionally never named in the underlying state court litigation, is somehow acting improperly in seeking to protect her community property from execution by Russell. This proposition is so facially defective as to require little response. The trial court (as well as the Court of Appeals) acknowledged the valid business reasons underlying the transactions in question, *see* Findings, App. D at A 18-19; *Jackson v. Russell*, 533 N.E.2d 153, 155 (Ind. App. 1989), App. A at A-6 – and held the transfers improper only because they impaired Russell's efforts to execute on property believed to be owned solely by judgment debtor, C. W. Jackson. If, as demonstrated below, the property in question was immune from execution because it belonged to non-judgment debtor Marguerite, Russell has no legitimate complaint arising out of his failure to name Marguerite in the original lawsuit.

2. The second false illusion is that the Court of Appeals applied Arizona law in deciding in favor of Russell. As shown in Section II below, this argument is directly contrary to the Court of Appeals' Opinion, and is an unconvincing and misleading effort to trivialize the constitutional violation perpetrated in this case.

3. The third false illusion is that this case is governed by *Allstate*'s[1] "significant contacts" test because it involves a routine "choice of law" issue. As shown in Section III below, this case precisely poses the question of whether a party's established community property rights can be abrogated because a forum state happens to have some contact with the controversy in question. For the reasons stated in Section III below, the full faith and credit clause requires more than "significant contacts" for a forum to extinguish established community property rights.

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[1] *Allstate Ins. Co. v. Hague*, 449 U.S. 302, *reh'g denied*, 450 U.S. 971 (1981).

II. THE INDIANA COURT OF APPEALS VIOLATED MARGUERITE'S CONSTITUTIONAL RIGHTS BY IGNORING ARIZONA COMMUNITY PROPERTY LAW.

It is truly remarkable how Russell recasts the Court of Appeals' Opinion, and his prior arguments, in his attempt to challenge the Petition. Be that as it may, the "best evidence" of what was decided by the Court of Appeals is the actual language of the Opinion. Contrary to Russell's present (and new) argument, it is patently untrue that the Court of Appeals factually ruled that the partnership and stock interests were community property under Arizona law – or that the Court of Appeals simply misapplied Arizona law on this issue. In this regard it is important to understand the context in which the Opinion was rendered. This context is well-illustrated by Russell's own second argument (and the one he has clung to consistently), in which he argues that Indiana's "significant contacts" with this case mandate the application of Indiana law. Russell has steadfastly maintained throughout this case that Arizona law must bow to Indiana statutory law with respect to his efforts to execute on the stock and partnership interests in question. And this is precisely what the Court of Appeals ruled in this case. After describing the transfers in question, the Court of Appeals dealt with the issue of which law was applicable to the case. *Jackson v. Russell*, 533 N.E.2d at 155-57, App. A at A 7-9. As a simple reading of these pages of the Opinion reveals, the Court of Appeals specifically ruled that the Indiana partnership "charging statute" and the "stock execution" statute authorized the execution on the property in question because the partnership and corporations were located in Indiana.[2]

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[2] As demonstrated in the Petition, Section D, pp. 22-24, this reliance on the partnership charging and the stock execution statutes was legally and constitutionally erroneous. These

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At the outset of its discussion of the conflicts issue, the Court of Appeals signals its intention to apply Indiana law by citing *Clark v. Williard*, 294 U.S. 211 (1935) ("*Clark v. Williard* II"), for the proposition that "every state has jurisdiction to determine for itself the liability of property within its jurisdictional limits to seizure and sale under the process of its courts." *Jackson v. Russell*, 533 N.E.2d at 155, App. A at A-7. The Court of Appeals then cites the partnership charging statute as the "applicable" statute. In applying the partnership charging statute, the Court of Appeals then gives short shrift to Arizona community property law:

> Jackson's arguments about community property notwithstanding, the overriding facts are that Jackson is a partner in an Indiana partnership whose assets are located in Indiana. I.C. 23-4-1-28 speaks directly and without equivocation to the fact situation present in this appeal.

Id. at 156, App. A at A-7.

Finally, the Court of Appeals summarizes its application of "Indiana law" in this case:

> In sum, we are of the opinion that Jackson has a properly rendered judgment against him and

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statutes simply provide the procedural mechanism for a creditor to execute on the partnership and stock interests of a judgment debtor. They do not – and constitutionally cannot – authorize a judgment creditor to execute on property owned by someone who is *not* a judgment debtor. Were Marguerite's community property rights recognized by the Indiana courts, the execution would not be appropriate because Marguerite had an indivisible community property interest in all of the stock and partnership interests in question. *See* Petition, Section B, pp. 16-17. However, as reflected in the Opinion, the Court of Appeals simply ignored Marguerite's community property rights established by the law of her domicile – Arizona.

> that *Indiana* law makes Jackson's partnership interest in Jackson Plastics subject to execution in satisfying that judgment.

Id. (emphasis added).

Exactly the same approach was followed with respect to the stock interests in question. The trial court had ruled that Arizona community property law precluded execution on these interests. The Court of Appeals, however, ignored Arizona law and ruled that the stock execution statute (I.C. 34-1-36-5) authorized the execution in question:

> We are of the opinion that I.C. 34-1-36-5 controls under the facts before us.
>
> * * *
>
> It is our belief that, by reason of our determination of the prior issue, Jackson's shares of that stock are also subject to execution by the judgment creditor pursuant to I.C. 34-1-36-5.

Id., App. A at A-9.

In light of the foregoing, it is a specious rewriting of history for Russell to argue now that the Court of Appeals was factually finding that the partnership and stock interests were not "intended" to be held as community property under Arizona law. It is equally specious for Russell to intimate that the Court of Appeals may have simply misapplied Arizona community property law on this issue. This post-facto sophistry is highlighted by Russell's citation to *National Industries, Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258 (9th Cir. 1982). There, the Ninth Circuit discussed the powerful Arizona presumption in favor of community property ownership,[3] but

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[3] Indeed, in light of the strong community property presumption, i.e., "[t]his presumption can be rebutted only by 'strong', 'satisfactory', 'convincing', 'clear and cogent' or 'nearly conclusive' evidence," 677 F.2d at 1266 (quoting *Porter v. Porter*, 67 Ariz. 273, 195 P.2d 132 (1948)), the court recognized

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found that the presumption was overcome by the specific evidence of the spouses' intent in that case. *National Industries* illustrates the appropriate decision-making process for courts to apply in determining community property rights under Arizona law. A fair reading of the Opinion clearly demonstrates that the Court of Appeals did *not* follow such process in this case (either correctly or incorrectly), but instead eschewed Arizona law in favor of its preference for Indiana law.[4]

In short, the Court of Appeals never applied (or even misapplied) Arizona law, but instead refused to consider Marguerite's community property rights in order to benefit an Indiana judgment creditor. If this Court agrees (by reason of argument in Section III below) that Indiana was required to recognize Arizona community property rights in this case, this matter must be remanded to the Indiana courts for application of Arizona law to the facts of this case.

III. THE "SIGNIFICANT CONTACTS" TEST DOES NOT GOVERN THE PROPERTY RIGHTS ISSUE POSED BY THIS CASE.

At least Russell's argument in Section 2 of his Brief is consistent with his position throughout this litigation – which is that Indiana's contacts with this case bar the

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that the issuance of a single joint tenancy deed that purports to create a joint tenancy estate does not so operate. 677 F.2d at 1267.

[4] As an introductory comment to his fallacious argument that Arizona law was applied by the Court of Appeals, Russell notes that the federal issue involved must be raised and decided. As demonstrated in the Petition, pp. 3-7, the "full faith and credit" and "due process" federal issues were raised by petitioners on a number of occasions, and the Court of Appeals' refusal to apply Arizona law was a clear decision against petitioners on these issues.

application of Arizona community property law. In constitutional terms, Russell claims that the full faith and credit clause (like the due process clause) permits a forum state to ignore property rights established under a sister state's law so long as the forum has "significant contacts" with the controversy. This starkly poses the basic certiorari issue in this case: should the "significant contacts" test permit the abrogation of community property rights established by a sister state? To isolate this issue analytically, consider the following factual scenario which is simpler than (but analytically indistinguishable from) the present case.

Let us first assume that an Indiana creditor (like Russell) obtains a judgment against a husband, but intentionally refrains from joining the spouse (like Marguerite) in the Indiana litigation.

Let us next assume that the judgment debtor and spouse are residents of a community property state (like Arizona) who drive their only automobile (which they own as community property) through Indiana (a non-community property state) – and that the Creditor attempts to execute on such car pursuant to the general execution statutes in Indiana.

Let us further assume that the community property state exempts from execution one car per judgment debtor, but Indiana has no such exemption statute.

Finally, let us assume that the law of the community property state (as does Arizona) confers an indivisible ownership right in each spouse in the car in question.

The first issue posed by this hypothetical is whether the Arizona or Indiana exemption law applies to the automobile while in Indiana. We agree that Indiana law would apply to that issue as this is a classic "choice of law" problem which is properly governed by the *Allstate* "significant contacts" standard. Indeed, this is a proper application and explanation of the general comment in *Clark v. Williard* II (relied upon by the Court of Appeals) that "every state has jurisdiction to determine for itself

the liability of property within its territorial limits to seizure and sale under the process of its courts." *Jackson v. Russell*, 533 N.E.2d at 155, App. A at A-7.

But this certainly does not end the inquiry. There remains the critical question of whether the Indiana courts can authorize execution on the automobile in derogation of the spouse's community property ownership interest in the automobile. Russell would argue that such abrogating power exists because Indiana is "significantly connected" with the matter by virtue of the creditor's Indiana judgment and the location of the automobile within the state of Indiana. The full faith and credit clause, however, requires the rejection of this argument when established property rights are at issue. Because Arizona law establishes an indivisible property right of the spouse in this community-owned automobile, this "property right" cannot be extinguished under the guise of a simple "choice of law" by a forum state.

This illustration (like our case) poses the issue of whether the full faith and credit clause is to be accorded a reach independent of (and broader than) the due process clause. As noted by Justice Stevens (in his concurrence in *Allstate*) and by commentators, the full faith and credit clause is historically and analytically distinct from the due process clause. *See* Petition, Section A, pp. 9-11. Instead of just negatively forbidding the application of a forum's law where there is insufficient contact with the state, the full faith and credit clause affirmatively mandates the application of a given state's law in particular circumstances. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1590 (1978); *see* Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. Cal. L. Rev. 1299, 1300, 1311 (1987). The application of the community property law of the spouse's domicile is mandated under this concept where, as in our example and our case, the issue being decided is *who owns* the property in question. In other words, if the community property law of the

marital domicile establishes an indivisible property interest in personal property in favor of the wife, the forum cannot ignore or destroy such property right to benefit a judgment creditor of the husband alone.

Russell's arguments notwithstanding, the *Clark v. Williard* cases support the foregoing analysis. In *Clark v. Williard*, 292 U.S. 112 (1934) ("*Clark v. Williard* I"), the issue was the nature of the ownership or "title" of the liquidator to the personal property in question. On this "ownership" issue, this Court stated that the law of the domicile of the owner (i.e., Iowa) must prevail pursuant to the full faith and credit clause of the constitution notwithstanding the location of the property within Montana.[5]

In *Clark v. Williard* II, this Court simply held (analogously to the exemption issue in our hypothetical) that a state can set general rules of execution on property and did not have to afford a liquidator any greater rights than the original corporation to whose rights the liquidator succeeded.[6]

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[5] Russell's attempt to characterize *Clark v. Williard* I as a situation in which the Montana court simply misinterpreted Iowa's statutes and court decrees is far too narrow a reading. The Montana court had specifically concluded that no constitutional provision required it to recognize the title of the receiver to the detriment of its own citizens, 292 U.S. at 121, and this Court held that the full faith and credit clause *did* so require. Indeed, this "misinterpretation of state law" argument by Russell is inconsistent with Russell's position that an error in interpreting another state's law is not a violation of full faith and credit.

[6] Russell's reliance on *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664 (1877), is equally unavailing. As did *Clark v. Williard* II, this case simply holds that the forum state has the right to invoke its collection procedures within its borders against property owned by the judgment debtor and located within the forum.

In any event, if there is any confusion as to the proper meaning of the 55-year-old *Clark v. Williard* cases, the present case is an excellent opportunity for the Court to resolve the confusion and to speak authoritatively on the application of full faith and credit to community property rights. Moreover, this case affords the Court an opportunity to apply the full faith and credit clause in a manner which does not result in community property residents (there are eight community property states) acting at their own peril by owning or bringing community property to a non-community property state.

IV. CONCLUSION.

For the reasons stated in this Reply and the Petition, the reversal of the Opinion is necessary to advise the courts of all states that established state law property rights are entitled to protection wherever a citizen travels in these United States. Accordingly, the Petition for Certiorari should be granted.

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